IFAR Journal

INTERNATIONAL FOUNDATION FOR ART RESEARCH

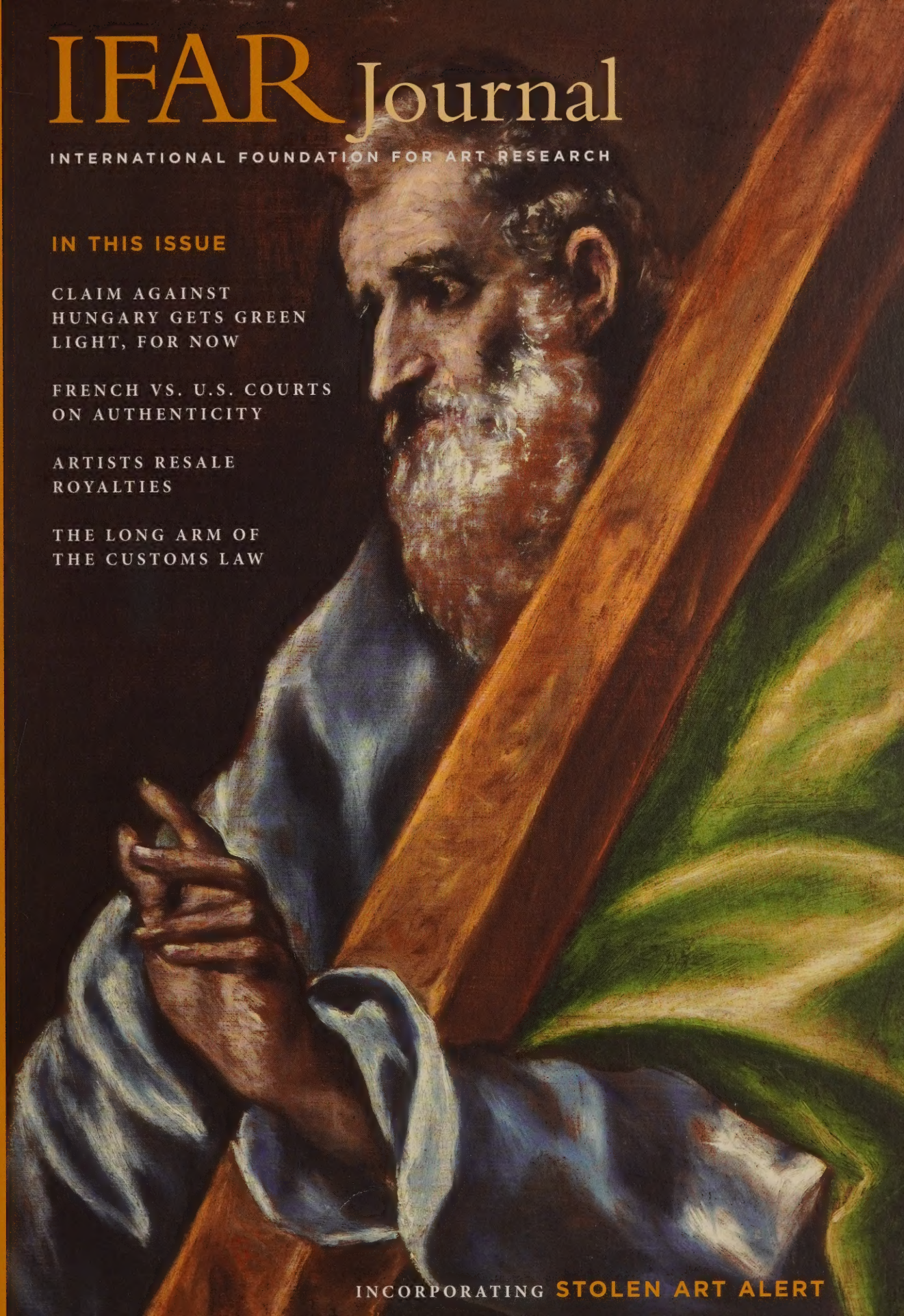
IN THIS ISSUE

CLAIM AGAINST HUNGARY GETS GREEN LIGHT, FOR NOW

FRENCH VS. U.S. COURTS ON AUTHENTICITY

ARTISTS RESALE ROYALTIES

THE LONG ARM OF THE CUSTOMS LAW



INCORPORATING STOLEN ART ALERT

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IFAR Journal

INTERNATIONAL FOUNDATION FOR ART RESEARCH

2 NEWS & UPDATES

2 Herzog Heirs Can Proceed with U.S. Action to Recover all but 11 Artworks

6 IN BRIEF:

- *"Living Garden" Artist Asks Supreme Court to Review Decision*
- *A Surprise Move in Pissarro Painting Battle: Cassirer Heirs Drop Case Against Spain*
- *Claimant Vows to Continue Fight for Cranachs after Supreme Court Setback*
- *Two Picassos Stolen in 2008 Are Recovered*
- *Suspect Says He Destroyed Paintings Stolen from Paris Museum*
- *Warhol Authentication Board Disbanded*

10 Forfeiture That's "Custom Made": Is a Tough Statute the New Trend in Art Recovery?

18 THE RIGHTS AND RISKS OF EXPERTS IN FRENCH AND AMERICAN COURTS
Van Kirk Reeves

28 RESALE ROYALTIES AND THE VISUAL ARTS: SHOULD THE *DROIT DE SUITE* COME TO THE U.S.?
A Panel Discussion: Theodore Feder, Martin Mullin. Christiane Ramonbordes, Frank Stella

37 STOLEN ART ALERT

COVER: EL GRECO (Domenikos Theotokopoulos). *Saint Andrew*, ca. 1610. Oil on canvas, 70 x 53.5 cm. Museum of Fine Arts, Budapest. Claimed by the heirs of Baron Herzog in a lawsuit in federal court in Washington, D.C. Photo Credit: Scala / Art Resource, NY.

HERZOG HEIRS CAN PROCEED WITH U.S. ACTION TO RECOVER ALL BUT 11 ARTWORKS

HUNGARY SAYS "NOT SO FAST"; SEEKS IMMEDIATE APPEAL

There is both good news and bad news for descendants of Baron Mór Lipót Herzog in their longstanding and complicated claim against the Republic of Hungary, and three Hungarian museums and a university, to recover artworks looted from the Baron's extraordinary collection. The good news is that a suit spearheaded by Herzog's American great-grandson, David de Csepel, will be allowed to proceed against Hungary in U.S. court.[1] The bad news is that, in that same ruling, the court affirmed as valid a 2008 Hungarian court decision holding that eleven of the works from the collection had become the property of Hungary under the doctrine of adverse possession. Immediately after the ruling, Hungary filed notice that it intended to seek an interlocutory review of the district court decision.

"There is both good news and bad news for descendants of Baron Mór Lipót Herzog in their longstanding and complicated claim against the Republic of Hungary . . ."

THE COLLECTION DURING THE NAZI AND COMMUNIST ERAS

Baron Herzog was a renowned Jewish Hungarian art collector and banker who, prior his death in 1934, had amassed an enormous collection estimated at around 2,500 art objects, the largest private collection in the nation. It included paintings by El Greco, Zurburan, Cranach, and Courbet. Shortly after the collection passed to Herzog's three children, however, Hungary joined the Second World War on the side of the Axis Powers and instituted a series of anti-Jewish laws. One of Herzog's sons, András, perished in a forced labor camp for Jews in 1943. In 1944, after Hungary attempted to surrender to the Allies, Nazi Germany sent troops to Hungary to ensure its loyalty and to assist in the fight against the advancing Russian army. The Nazis, along with Hungarian forces, sent more than 440,000 Hungarian Jews to Auschwitz and other death camps and stripped Jews of their possessions. The surviving Herzog son, István, escaped from a camp-bound train. Herzog's daughter, Erzsébet (Elizabeth) de Csepel, fled Hungary in May 1944, ultimately settling in the United States.

In 1944, Hungarian officials aided by Nazi collaborators discovered the collection, most of which the family had hidden in a factory cellar. The artworks were taken to Adolf Eichmann's Budapest hotel for his inspection, where he chose some of the best pieces to be sent to Germany as "trophies" (Germany restituted a work to Herzog's heirs in 2010).

After the war, Hungary returned a few items to the Herzog family — apparently pursuant to the 1947 Peace Treaty between Hungary and the Allies[2] — but held on to the majority of the works, placing them in the state-owned Museum of Fine Arts, the Hungarian National Gallery, the Museum of Applied Arts (the "Museums"), and the Budapest University of Technology and Economics (the "University"). Hungarian officials, the family says, continued to harass and threaten the Herzogs — leveling, for instance, false claims of smuggling — until they agreed under new bailment agreements to re-deposit the few works that had been restituted, some of which were then exhibited with labels indicating that they were "on deposit" from the Herzog collection.

When the Communists took control of Hungary in 1947, the government simply retained many pieces, including those once belonging to the Herzogs. The United States essentially severed diplomatic ties with Hungary in 1951, and in 1955, it decided to use Hungarian assets it had frozen to partially compensate U.S. nationals for claims against Hungary for, among other things, property that had been nationalized. Erzsébet (Herzog)

1 *De Csepel v. Republic of Hungary*, No. 10-1261 (ESH), slip op. (Sept. 1, 2011, D. D.C.).

2 Article 27 of the peace treaty required Hungary to restore, or when impossible, to provide fair compensation for property confiscated after 1939 "on account of [a person's] racial origin or religion."

de Csepel, who had emigrated to the U.S. in 1946 and became a naturalized U.S. citizen in 1952, filed a claim for twelve artworks in the collection of the Hungarian Museum of Fine Arts, seven of which she said she owned out-right, and the others jointly with her siblings. She received a payment of $210,000 on her claim for both real estate and artworks and reserved her rights to proceed against Hungary for additional amounts. In March 1973, the U.S. and Hungary entered into an agreement (the "1973 Agreement") pursuant to which Hungary paid $18,900,000 to the U.S. for a "full and final settlement" of claims by the U.S. or its nationals against the Hungarian government.[3]

THE HUNGARIAN COURT CASE

After the collapse of Hungary's Communist government in 1989, Erzsébet, then 89 years old and living in California, resumed her attempts to negotiate the return of the family's artworks. As a result of those efforts, Hungary returned seven minor pieces to Erzsébet before her death in 1992, but kept the collection's masterworks in the Museum of Fine Arts and the Hungarian Gallery, both in Budapest.

Erzsébet's daughter, Martha Nierenberg, continued her mother's efforts to have the art returned. After a Hungarian commission tasked with determining the ownership status of the works failed to reach a decision, Martha filed a Hungarian court lawsuit in 1999 for the return of 12 paintings that had belonged to her mother (one, a Munkácsy, was returned to her without explanation prior to trial). The Budapest Metropolitan Court initially ruled in her favor and ordered all but one of the paintings to be returned. Hungary appealed, and in 2002, the Supreme Court of Hungary vacated the ruling. After yet another court decision and appeal, the Metropolitan Appellate Court ultimately ruled on January 10, 2008 that Erzsébet's claim was barred because she had received compensation from the U.S. government in 1959, and that, thereafter, Hungary had obtained ownership of the artworks through adverse possession.

FIGURE 1. EL GRECO (Domenikos Theotokopoulos). *Agony in the Garden,* ca. 1608. Oil on canvas, 170 x 112.5 cm. Museum of Fine Arts, Budapest. Claimed by the heirs of Baron Herzog in a federal lawsuit in Washington, D.C.

FIGURE 2. FRANCISCO DE ZURBURÁN. *Saint Andrew,* ca. 1630-34. Oil on canvas, 146.7 x 61 cm. Museum of Fine Arts, Budapest. Claimed by the heirs of Baron Herzog in a federal lawsuit in Washington, D.C.

DE CSEPEL SEEKS U.S. HEARING

In 2010, the Herzog heirs — de Csepel (Erzsébet's grandson) and András Herzog's daughters, Italian nationals Angela Maria Herzog and Julia Alice Herzog (collectively, the "Herzog heirs")— filed suit against Hungary, the Museums and the University (collectively, "Hungary") in U.S. federal district court in Washington, D.C. The suit, which is based on the theory that Hungary holds the artworks not as owners but as "bailees," sought the return of more than three dozen paintings and sculptures, plus other artworks — together said by the family to be worth more than $100 million. These include El Greco's *Agony in the Garden,* and other masterworks by Francisco de Zurbarán, Gustave Courbet and Camille Corot (**FIGS. 1-3 and cover**). Significantly — and exceptionally — the suit also seeks a full and transparent accounting of all works from the Herzog collection in Hungarian possession. Charles A. Goldstein, Counsel to the Commission for Art Recovery, which is supporting the family's claim, told IFAR that "the family believes that there are many other Herzog works in the possession of the government." The Herzog heirs also believe that their claim represents the "last unresolved Holocaust art claim of this magnitude."[4]

3 Agreement between the Government of the United States of America and the Government of the Hungarian People's Republic Regarding the Settlement of Claims, March 6, 1973, 27 U.S.T. 522 (the "1973 Agreement").

4 See: http://www.hungarylootedart.com, a website set up by the Herzog family attorneys, for many relevant legal documents and a full listing of the claimed artworks.

"Significantly – and exceptionally – the suit also seeks a full and transparent accounting of all works from the Herzog collection in Hungarian possession."

De Csepel, a California-based marketing consultant in his 40s (and husband of Joy Chen, former deputy mayor of Los Angeles), explained the rationale for the suit to the *Los Angeles Times*: "It's not like I want to have the paintings hanging in my home . . . . It's more of a feeling of wanting justice for my family . . . . My family was forced at gunpoint to leave Hungary, and some didn't make it . . . . We can't of course redo the past, but there are some areas where justice can be done."[5]

HUNGARY'S RESPONSE

Hungary filed a motion to dismiss de Csepel's claim on February 15, 2010, arguing its sovereign immunity protects it from being sued in the United States and that the Herzog heirs' claim was covered by the 1973 Agreement, thus bringing it outside of the court's jurisdiction. Hungary also contended that the United States is not the proper forum to resolve the claim; and that the suit is barred by the statute of limitations, international comity, the Act of State Doctrine, and claim and issue preclusion. Hungary's decision to pursue what many people considered largely technical (although not insignificant) defenses was met with rancor in some quarters, given that at the 2009 Prague Conference on Holocaust looted property, Hungary, along with 47 other nations, agreed in principle to the Terezin Declaration, that Holocaust claims should be decided on the merits and not on technical grounds. That agreement, as well as the 1998 Washington Principles, to which Hungary also agreed, was not binding, however, and Hungary's defenses are fully available to it under U.S. law.

FIGURE 3. CAMILLE COROT. *Portrait of a Woman (Lady with a Marguerite)*, ca. 1868-70. Oil on canvas, 78 x 57.7 cm. Museum of Fine Arts, Budapest. Claimed by the heirs of Baron Herzog in a federal lawsuit in Washington, D.C.

This September, the D.C. federal district court ruled on Hungary's motion, producing mixed results for the Herzog heirs. Significantly, it found that Hungary's status as a sovereign did *not* immunize it from this particular suit in the United States; Hungary's acts with respect to the artworks, the court ruled, fell within the "expropriation exception" to the Foreign Sovereign Immunity Act, 28 U.S.C. § 1605(a)(3). That is, Hungary's behavior was actionable in U.S. court because the Complaint made "substantial and non-frivolous claims" that the art had been taken in "violation of international law." In so finding, the court rejected Hungary's argument that the taking had been carried out by Hungary against the Herzog family as "Hungarian citizens" and thus did not violate international law.[6] As the Herzog heirs pointed out, and the court agreed, Hungary did not consider the Herzog family, as Jews, to be Hungarian citizens at the time of the taking. The court also noted that, in any event, German Nazis were involved in the art takings as well, making the looting an "international" event.

The court went on to hold that, contrary to Hungary's assertion, the 1973 Agreement between Hungary and the United States had not settled the matter. For one thing, it did not cover claims of individuals—such as the Herzog heirs' Italian predecessors—who were not U.S. citizens. For another, the 1973 Agreement only purported to settle claims arising between 1952 and 1973 (essentially, Communist-era nationalizations), whereas the taking at issue here occurred during the Holocaust. The court also rejected Hungary's claim that the compensation that Erzsébet had received in 1959 from the frozen Hungarian assets at least partially precluded the new U.S. claims, noting that the 1959 award explicitly allowed her to seek additional recovery, including restitution, from Hungary.

The court further upheld the Herzog heirs' "bailment" theory of the case—that Hungary held the works as "bailees," and rejected Hungary's "*forum non conveniens*" argument that U.S. courts are too impractical a location. It also found that the allegations in the Complaint supported the argument that the statute of limitations had been "equitably

5 Jori Finkel, "Jewish banker's heirs sue Hungary for return of looted art," *Los Angeles Times* (July 29, 2010).

6 The court pointed out that "it is well-settled that a state's taking of the property of its own citizens, no matter how egregious, does not constitute an international law violation."

FIGURE 4. LUCAS CRANACH THE ELDER. *The Annunciation to Saint Joachim.* Oil on panel, 61 x 51 cm. Museum of Fine Arts, Budapest. A district court in Washington, D.C. has ruled that the painting cannot be part of the ongoing Herzog claim in the U.S.

FIGURE 5. ALONSO CANO. *Infante Don Baltasar Carlos.* Oil on canvas, 144 x 109 cm. Museum of Fine Arts, Budapest. A district court in Washington, D.C. has ruled that the painting cannot be part of the ongoing Herzog claim in the U.S.

tolled"—that is, the clock stopped running—during the Communist era as well as during the pendency of the Hungarian litigation, a ruling in stark contrast to another recent statute of limitations ruling, in New York, regarding the claim of the family of the artist George Grosz to recover works in the collection of the Museum of Modern Art. In terms of the Act of State Doctrine—which "precludes the courts of this country from inquiring into the validity of public acts of a recognized foreign sovereign power committed within its territory"—the court noted that when the alleged "sovereign" is "Nazi Germany" and its allies, "courts have consistently held that the act of state doctrine does not apply to the Nazi taking of Jewish property during the Holocaust." Moreover, as an issue in this case is whether a bailment was created between Hungary and the Herzog heirs, and that is a "purely commercial" interaction as opposed to a sovereign act, the Act of State Doctrine, the court said, is irrelevant. Finally, the court rejected Hungary's theory that plaintiffs' claims had been settled in full by the U.S. government pursuant to the 1947 Peace Treaty and the 1973 Agreement.

In spite of the court's almost uniform rejection of Hungary's arguments for dismissal, its decision ended on an up-tick for Hungary: it held that the Hungarian court proceeding brought by Martha Nierenberg in 1999 and decided in 2008 had fairly and finally decided the fate of the eleven paintings that were at issue in that case and are still in Hungary, including works by Alonso Cano and Lucas Cranach the Elder (**FIGS. 4 & 5**). The U.S. courts, therefore, would not allow a second suit to re-litigate their fate. Hungary's lead attorney, Thaddeus J. Stauber, not surprisingly, took that as a good omen, noting in a press release that: "As the District Court recognized the firmness and legitimacy of the Hungarian courts, the District Court should likewise have issued a decision that the remaining claims were long ago resolved or should be litigated in Hungary." And whether the case proceeds in the U.S. or Hungary, he predicted "that the Republic of Hungary's rightful ownership to the remaining artworks [would] likewise be confirmed."

WHAT HAPPENS NEXT

On September 9, Hungary informed the Court of Appeals for the D.C. Circuit of its intention to seek so-called "interlocutory" review of the district court's decision, meaning that it intends to appeal aspects of the case even before it goes to trial.[7] While Hungary has the automatic right to an interlocutory appeal concerning its sovereign immunity defense, it needs the court's permission to appeal other issues. On September 26, Hungary sought such permission to immediately appeal the court's rulings as to (1) choice of forum; (2) the statute of limitations; (3) whether the dispute is a non-justiciable political question; (4) whether the plaintiffs had adequately stated a bailment claim; and (5) whether the case is barred by the Act of State Doctrine. A decision on whether to allow the appeal is not expected before November. In the meantime, the trial court has halted all proceedings.

— SHARON FLESCHER
AND
MARY MORABITO ROSEWATER
IFAR LEGAL ASSOCIATE

7 See 28 U.S.C. § 1292 (b), which provides for interlocutory appeals in situations that involve "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

In Brief —

"LIVING GARDEN" ARTIST ASKS SUPREME COURT TO REVIEW DECISION

Artist Chapman Kelley, creator of *Chicago Wildflower Works I* — a municipal "living garden" whose fate was the subject of a "moral rights" dispute between Kelley and the City of Chicago — is asking the U.S. Supreme Court to review his case. As we reported in the last issue (Vol. 12, no. 3, 2011), Kelley sued the Chicago Park District after it re-shaped and reduced the size of the garden over his objections. He claimed that the city had violated his moral rights under the Visual Arts Rights Act of 1990 (sometimes referred to as "VARA").

A federal appellate court disagreed with Kelley, holding that living gardens are not copyrightable (for an artwork to be protected by VARA, it must first be copyrightable) because they are neither "authored" nor "fixed." It explained: "gardens are planted and cultivated, not authored. A garden's constituent elements are alive and inherently changeable, not fixed." In his July 18 application to the Supreme Court, Kelley argues that the appellate court's interpretation is too rigid, and that it unfairly excludes from copyright protection artwork that uses living, changing materials. In a friend of the court brief, Volunteer Lawyers for the Arts argues that if the Seventh Circuit's narrow definition of an artwork were allowed to stand, it would "hinder future artistic and intellectual advancement."

A SURPRISE MOVE IN PISSARRO PAINTING BATTLE: CASSIRER HEIRS DROP CASE AGAINST SPAIN

There have been two major developments in the case of *Cassirer v. Kingdom of Spain*, which IFAR first wrote about in Vol. 10, no. 2, 2008. On June 27, when the U.S. Supreme Court decided not to review a decision by a federal district court in California allowing Spain to be sued in the U.S., it seemed to be an important partial victory for the Cassirer family in its efforts to recover an 1897 Pissarro painting (**FIG. 1**) it had lost to the Nazis in 1939. In a surprising second development, however, the Cassirer heirs dropped the case against Spain just days later, apparently at the recommendation of the U.S. Department of State. This leaves the private Spanish entity that possesses the painting (the Thyssen-Bornemisza Collection Foundation) as the only remaining defendant, and it, too, is demanding to be released from the suit.

The painting at issue was once owned by Lilly Cassirer Neubauer, a German Jewish art collector who, the suit says, was forced to sell it to the Nazis. It eventually entered the art market and was purchased from a New York gallery in 1976 by Baron Hans-Heinrich Thyssen-Bornemisza, whose collection was acquired by Spain in 1993. When Lilly's grandson Claude sued Spain and the Foundation in 2005 (Claude died in 2010; the suit is being pursued by his heirs), Spain argued that, as a foreign sovereign, it could not be hauled into U.S. court. A federal court disagreed, holding that the "expropriation exception"

FIGURE 1. CAMILLE PISSARRO. *Rue Saint-Honoré, après-midi, effet de pluie.* Oil on canvas, 1897. Coll. Thyssen-Bornemisza Collection Foundation. The subject of a restitution claim.

to the Foreign Sovereign Immunities Act, which allows foreign states to be sued in the U.S. for property taken in violation of international law, applied to Spain even though *it* was not the state that initially took the painting. Spain and the Foundation asked the Supreme Court to review the case, but it declined.

Separate from the jurisdictional wrangling, lawyers for the Foundation had contended — both in press releases and to the State Department — that in 1959, Cassirer's grandmother settled, and was fully compensated on, her claims to the painting. It is not clear whether that was the reason the State Department recommended that the Cassirer heirs drop the case against Spain, or whether it had anything to do with a November 2010 leak by WikiLeaks of a July 2008 diplomatic cable suggesting that the State Department offered to help Spain in its lawsuit against an American company, Odyssey, to claim underwater treasures discovered by Odyssey in exchange for Spain's help in restituting the Pissarro painting.

In September 2011, as *IFAR Journal* was going to press, the Thyssen-Bornemisza Collection Foundation filed a motion to dismiss, arguing that the California statute of limitations that initially permitted the Cassirer family to file suit is unconstitutional. (For more on that California statute, see the *Von Saher* update below.)

CLAIMANT VOWS TO CONTINUE FIGHT FOR CRANACHS AFTER SUPREME COURT SETBACK

On the same day that it decided not to review the *Cassirer* case, the U.S. Supreme Court also refused to allow the appeal of another World War II-related art loss claim — this one turning on the legitimacy of California's expansive statue of limitations for Holocaust-era claims (*Von Saher v. Norton Simon Museum of Art*).

As we previously reported (Vol. 10, no. 2, 2007), Marei von Saher, heir and daughter-in-law of Jacques Goudstikker, a prominent Dutch Jewish art dealer before World War II, sued Pasadena's Norton Simon Museum for the return of Lucas Cranach the Elder's 16th century diptych of *Adam and Eve* (**FIG. 2**). The diptych was taken by the Nazis when Goudstikker fled the Netherlands. After the war, the work was returned to the Dutch government, which restituted it to the Stroganoff family, the presumed owners of the diptych in pre-Soviet Russia, who then sold it to Norton Simon in 1971.

The museum successfully argued to a federal appellate court that the California statute of limitations applicable to von Saher's claim was unconstitutional because it undermined the federal government's exclusive power to resolve war claims. The statute had allowed parties until the end of 2010 to bring suit for the return of "any article of artistic significance taken as a result of Nazi persecution during the period of 1929 to 1945." Von Saher asked the Supreme Court to review the appellate court decision. After seeking input from the U.S. Solicitor General, the Supreme Court refused to hear the appeal.

In spite of this setback, von Saher has vowed to battle on, declaring in June that she would "continue to fight in this case until justice is achieved." Meanwhile, in October 2010, California enacted a new six-year statute of limitations, drafted to avoid constitutional pitfalls. The new statute encompasses both Holocaust and non-Holocaust-related art loss. Whether the new statute will survive judicial scrutiny, and whether von Saher can or will attempt to proceed under it, remains to be seen. However, in July,

FIGURE 2. LUCAS CRANACH THE ELDER. ***Eve,*** **part of a diptych of** ***Adam and Eve,*** **c. 1530. Oil on panel. Coll. Norton Simon Art Foundation, but claimed by the heir of Jacques Goudstikker.**

she was unsuccessful in obtaining a rehearing before the federal appeals court that she hoped would resuscitate her claim under the *original* statute of limitations: she had wanted to argue that the decision in her case conflicted with a 2010 decision that allowed for an extension of the statute of limitations for insurance claims related to the Armenian Genocide (*Movsesian v. Victoria Versicherung AG*).

BREAKING NEWS

WARHOL AUTHENTICATION BOARD DISBANDED

On October 19, The Andy Warhol Foundation announced the dissolution of the Andy Warhol Authentication Board, Inc. effective in early 2012. The Authentication Board has been in the news recently (including *IFAR Journal*) because of its involvement in several lawsuits. It will continue to review authentication requests that were submitted prior to October 19, 2011, and the Foundation will continue to work on the multi-volume Warhol catalogue raisonné.

TWO PICASSOS STOLEN IN 2008 ARE RECOVERED

FIGURES 3 AND 4. PABLO PICASSO, *Tête de Cheval*, c.1962 (left) and *Verre et Pichet*, c.1944 (right). Both, oil on canvas. Coll. Sprengel Museum, Hannover. Stolen in 2008 while on loan in Switzerland and found in Serbia in 2011.

As *IFAR Journal* went to press, news came that two Picasso paintings that were stolen in February 2008 while on loan from a German museum to an exhibition in Switzerland, were recovered in Serbia (a country whose nationals factor in other recent thefts; see, for example, story below). There is no word yet as to who stole the Picassos; whether any suspects are in custody; or where the paintings are currently located, other than that they are in a "safe location" and "in tact."

The two paintings: *Tête de Cheval* (**FIG. 3**) of 1962 and *Verre et pichet* of 1944 (**FIG. 4**), both belonging to the Sprengel Museum in Hannover, Germany, were on loan to an exhibition in a cultural center in Pfäffikon Sz, in the Swiss canton of Schwyz not far from Zurich. On October 7, 2011, the cantonal prosecutor, Charles Faessler, announced "with pride and joy" on the Swiss Broadcasting Service, SF, that after "three-and-a-half years of investigative work," the two Picassos had been located. He added that Switzerland had made an official request to Serbia for their return, but he provided few other details.

Although IFAR published pictures of the two Picassos in the *Stolen Art Alert* section of the *Journal* (Vol. 10, no. 1, 2008, stolen item numbers 3 and 4), the theft was overshadowed by an even more spectacular robbery in Switzerland just four days later, when three masked gunmen stole four Impressionist and Post-Impressionist works — by Cézanne, Degas, Monet, and Van Gogh — from the Bührle Collection, a private museum in Zurich. The Monet and Van Gogh were found less than two weeks later, in an abandoned car, but the Cézanne and Degas are still missing. At the time of the Bührle theft, it was reported that the thieves spoke German with a Slavic accent, but it is not known whether there was any connection between the two thefts.

SUSPECT SAYS HE DESTROYED PAINTINGS STOLEN FROM PARIS MUSEUM

In a story that has not yet been confirmed, either by French police or IFAR, news broke as we went to press that the five works stolen from the Musée d'Art moderne de la Ville de Paris in May 2010 and reported in *IFAR Journal* (Vol. 11, nos. 3&4) were destroyed by one of the criminals involved in the theft.

The works — by Matisse, Braque, Picasso, Léger, and Modigliani (**FIG. 5**), and all belonging to the museum's permanent collection — were taken during the night of May 19-20, 2010, when a lone thief took advantage of a lax security system and smashed a window pane on the side of the museum, broke a padlock, entered several rooms, took five paintings from the walls, removed their frames, and escaped, eluding the three museum guards on duty in the basement.

The theft from the municipal museum, which is located on the Right Bank across from the Eiffel Tower (not to be confused with Paris' other museum of modern art, the Centre Pompidou), created an uproar at the time. The Mayor of Paris called it "an intolerable attack on the universal cultural patrimony of Paris." It was said to be the largest museum theft in Paris history.

An investigation revealed that, while there were malfunctions in the security system — the alarm was missing a part — there were also systemic failures in procedures. What, for example, were the guards doing during all the time the thief was in the museum? Closed circuit footage, while grainy, did manage to pick up the intruder; why was he not stopped?

On October 1, 2011 it was revealed that three men — the apparent thief and two accomplices — who were questioned about the theft by the BRB (Brigade de répression du banditisme) in mid-September, were formally being held and investigated for the crime. They have reportedly admitted involvement, but have conflicting stories.

They are publicly known only by first names. The first one apprehended — Vrejan T., a Serb nicknamed "Spiderman" (l'homme-arraignée) — was actually called in for questioning only a few days after the museum theft, but for a different robbery. He apparently told the police how he committed the museum theft. Ordered only to steal the Léger, *Still Life with Candlestick,* he cased the museum and loosened window screws a few days beforehand. The night of the theft, he simply removed the window pane and the padlock. Once inside, he was "surprised," he told police, not to hear an alarm, so he lingered and took the additional four paintings.

He put the ultimate blame on a second man, Jean-Michel C., an antiques dealer, who, he said had ordered the heist and promised him 40,000 euros, but never paid up. The antiques dealer, who runs a shop called Antiquités Bastille and was already under arrest for selling other stolen art works, denied that he instigated the crime, but did admit that the five museum pieces were left in his shop.

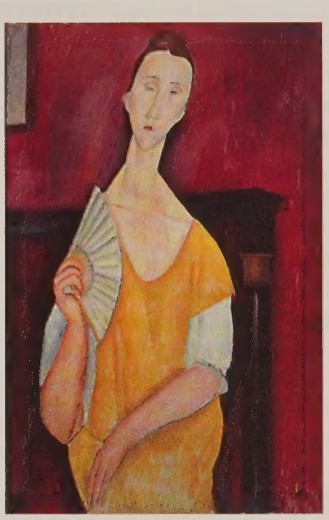

FIGURE 5. AMEDEO MODIGLIANI. *Woman with a Fan,* 1919. One of 5 paintings stolen from the Musée d'Art moderne in Paris in May 2010 and said to have been destroyed (unconfirmed).

In turn, the dealer passed the works to a third man, known as Jonathan B., a watchmaker with connections, for fencing. But the watchmaker told investigators that he "panicked" this spring when the two other men were implicated, and he destroyed the works and threw them away — in a rubbish bin!! Police are not sure whether to believe his story, and are investigating it, but it does play into everyone's worst fears — that stolen artworks will be destroyed rather than let them remain as evidence.

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— S.F. AND M.M.R.

FORFEITURE THAT'S "CUSTOM MADE"

IS A TOUGH STATUTE THE NEW TREND IN ART RECOVERY? THREE RECENT CASES SUGGEST THAT IT IS

U.S. law enforcement officials have been turning to a formidable customs law forfeiture statute to recover, or help foreign countries recover, stolen or illegally exported art. The provision, 19 U.S.C. § 1595a, has Prohibition-era roots and was traditionally used to seize items used in bootlegging and, later, drug trafficking. Its effective use in certain high profile art forfeiture cases, however — such as the so-called "Steinhardt" case[1] and the *Portrait of Wally* restitution[2] — along with the relatively low burdens and broad powers the statute affords the government, signaled its potential as a tool for art recovery.

Three recent art recovery cases — two resolved and one still in its early stages — have featured the customs forfeiture statute front and center. They are:

- *U.S. v. The Painting Known as "Le Marche"*
- *U.S. v. Leda ed il Cigno* (Leda and the Swan)
- *U.S. v. Mask of Ka-Nefer-Nefer*

So far, the statute has been highly effective for the U.S. government, resulting in the court-ordered return of two art objects, one a Pissarro monotype stolen years ago from a French museum, and the other, a work exported illegally from Italy and improperly imported into the U.S. In the third action, the U.S. government is challenging a St. Louis museum's very standing to fight to keep an Egyptian antiquity said to be stolen.

TEXAS COLLECTOR BIDS ADIEU TO STOLEN PISSARRO

This June, a New York federal court ordered an American good faith purchaser of a Camille Pissarro monotype,[3] *Le Marché aux Poissons,* (FIG. 1) to forfeit the work to the U.S. government so that it could be returned to the French museum from which it had been stolen thirty years before.[4] While the return was the right outcome — if the work was stolen, it should be returned, and the museum had reported the theft immediately; in fact, it was registered in IFAR's own Stolen Art Database — the decision, for some, highlighted a cause for concern: that the statute, while broadly empowering the government, recognizes very few corresponding rights for good faith art purchasers. Given the Second Circuit's ruling in the case that the "innocent owner" defense does not apply to the customs law, those concerns are unlikely to be allayed.

FIGURE 1. CAMILLE PISSARRO (French, 1830-1903). *Le Marché aux Poissons.* Monotype on paper. 8 ½" x 6" (20.6 x 15.2 cm).

> "The statute, while broadly empowering the government, recognizes very few corresponding rights for good faith art purchasers . . ."

Le Marché aux Poissons, along with Renoir's *Jeanne à la Capeline,* was stolen from the Musée Faure in Aix-les-Bains, France on November 16, 1981. The museum's caretaker spotted the thief as he exited the museum. Her husband chased the thief but was unable to catch him. The museum reported the theft to Interpol in early 1982. Soon thereafter, IFAR entered

1 *U.S. v. An Antique Platter of Gold,* 991 F. Supp. 222 (S.D.N.Y. 1997), *aff'd.* 184 F.3d 131 (2d Cir. 1999).

2 *U.S. v. Portrait of Wally,* 663 F. Supp. 2d 232 (S.D.N.Y. 2009). *See also U.S. v. One Lucite Ball Containing Lunar Material,* 252 F. Supp. 2d 367 (S.D. Fla. 2003).

3 The medium has been variously reported as a monotype (Sotheby's catalogue), watercolor (its description in IFAR's *Stolen Art Alert* in 1982), and enhanced monotype possibly with pastel (conversation with the American's owner's expert). Based, in part, on this discrepancy, and differences in the reported dimensions, the American owner questioned whether her work was, in fact, the stolen work.

4 *United States of America v. The Painting Known as "Le Marche* No. 06 CV 12994 (S.D.N.Y. filed Nov. 6, 2006).

the work into its art theft database (now licensed to the Art Loss Register) and published it in the March/April 1982 edition of the IFAR *Stolen Art Alert* newsletter.

Two years later, a French citizen named Emil Guelton consigned *Le Marché* to Adelman Antiques in San Antonio. Guelton told Adelman that the Pissarro came from the estate of an old French family. Sharyl Davis purchased the work from Adelman for $8,500.[5] Although Davis did not consult the IFAR art theft database prior to the purchase, she did have the monotype authenticated by Barbara Stern Shapiro, a curator at Boston's Museum of Fine Arts and author of a book on Pissarro. Shapiro also provided Davis with a certificate of authenticity signed by a French expert, Paule Cailac. Neither Cailac nor Shapiro indicated that the work was stolen.

Nineteen years later, Davis consigned the work to Sotheby's for a May 7, 2003 auction (lot #103). Sotheby's estimated the work at $60,000 - $80,000, and listed the provenance in its auction catalogue as: "Emil Guelton, Paris; J. Adelman Antiques, San Antonio (Texas), acquired by the above in 1984 by the present owner." Later, a routine Sotheby's search with the Art Loss Register indicated that the work was stolen. French authorities were contacted and Sotheby's withdrew the work from auction.

French law enforcement officials tracked down Guelton and also the museum caretaker, who, twenty-two years after the heist, identified Guelton from a six-person photographic line-up. As Davis would later point out in court papers, however, the identification was not water-tight. For instance, at the time of the theft, Mme. Rivollet had described the thief as being between 20 and 25 years of age with brown eyes, not green-eyed and 40 as Guelton would have been. For his part, while Guelton admitted knowing Adelman and selling him paintings, he denied knowing anything about the robbery. The statute of limitations for theft having expired, French authorities instituted "a preliminary investigation against X" for *recel* (knowing possession of stolen goods). Guelton was a suspect, but charges against him were never brought.

The French Ministry of Justice thereafter contacted the U. S. Department of Justice seeking its assistance in securing the painting's return.[6] After an attempt by the U.S. Attorney for the Southern District of New York to facilitate a negotiated settlement failed, it instituted an *in rem* civil forfeiture action — *U. S. v. The Painting Known as "Le Marche"* — against the work of art itself, with the goal of returning it to France. U.S. Immigration and Customs Enforcement ("ICE") agents then seized the monotype from Sotheby's, and Ms. Davis joined the action as a third-party claimant.

The U.S. claimed that its right to forfeiture arose both under 19 U.S.C. § 1595a(c) (the customs law forfeiture provision, part of the Tariff Act of 1930), and a general civil forfeiture statute, 18 U.S.C. § 981(a)(1)(C). Leading its Complaint with the customs law, the government ultimately won the day. That provision vests ICE with the power to seize for forfeiture "[m]erchandise which is introduced . . . into the United States contrary to law," including items that are "stolen, smuggled, or clandestinely imported or introduced."[7]

The customs provision also provided the government with certain procedural and strategic advantages over other means of forfeiture. For one thing, in order to establish a right to forfeiture under the customs statute, the U.S. needed only to show "probable cause" — that is, a mere reasonable ground for belief — that the Pissarro was introduced contrary to law. After that, the burden would shift to Davis to establish by the higher "preponderance of the evidence" standard that the object was *not* introduced contrary to law.[8] For another

5 The work was actually purchased by a company owned by Davis and her husband, and full legal title passed to Davis upon her divorce in 1992.

6 When French authorities initially sought U.S. intervention, the U.S. expressed preliminary doubts about its ability to bring a viable claim. Letter from Mary Ellen Warlow, Director of the Office of Int'l. Affairs Criminal Div. Dep't. of Justice to Fr. Ministry of Justice, dated Sept. 28, 2005.

7 The U.S. asserted that, for purposes of its § 1595a(c) claim, *Le Marché aux Poissons* was imported in violation of the National Stolen Property Act (the "NSPA"), 18 U.S.C. §§ 2314-2315. Among other things, the NSPA prohibits the transportation of any "goods, wares [or] merchandise" by a person "knowing the same to have been stolen."

8 In spite of the broad powers granted to and low burdens placed upon the government under 19 U.S.C. § 1595a, it still must adhere to a statute of limitations, albeit under a liberal "discovery rule." Title 19 of the U.S. Code, Section 1621, provides that no "forfeiture of property accruing under the customs laws shall be instituted unless such . . . action is commenced within five years after the time when the alleged offense was discovered, or in the case of forfeiture, within 2 years after the time when the involvement of the property in the alleged offense was discovered, whichever was later; except that . . . any concealment or absence of the property, shall not be reckoned within the five year period of limitation." In this case, it seems that the

(and as discussed below), language in the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"),[9] indicated that the so-called "innocent owner defense" does *not* apply to customs law forfeitures.[10]

By contrast, the U.S. faced steeper hurdles with its general civil forfeiture claim, 18 U.S.C. § 981(a)(1)(C), which allows the U.S. government to seize property "which constitutes or is derived from proceeds . . . of any offense constituting . . . 'specified unlawful activity'."[11] Unlike the customs law, the general forfeiture provision is subject to CAFRA's reforms. Passed in 2000 with bipartisan support, CAFRA set out to ameliorate certain draconian aspects of civil forfeiture. The bill's sponsor, Congressman Henry Hyde (R-Ill.) explained: CAFRA was designed to return "civil asset forfeiture to the ranks of respected law enforcement tools that can be used without risk to the civil liberties and property rights of American citizens."[12] It provided, for example, for the appointment of counsel for indigent parties facing forfeiture, and placed new time limits and burdens on the government. It also enacted a uniform "innocent owner" defense. Accordingly, for its general forfeiture claim, the government needed to make the higher initial showing that the Pissarro was subject to forfeiture by a "preponderance of the evidence." After that, Davis would have an opportunity to defend by showing by a preponderance of the evidence that she was an "innocent owner."

"The court was 'in the unenviable position of determining who gets the artwork, and who will be left with nothing' . . ."

Specifically, CAFRA provides that an "innocent owner's interest in property shall not be forfeited under any civil forfeiture statute." However, it goes on to state that "the term 'civil forfeiture statute' . . . does not include . . . the Tariff Act of 1930," thus seemingly exempting the customs forfeiture statute from its reforms.[13] In cases where a property interest is acquired after the unlawful activity had taken place, a person is considered an "innocent owner" under CAFRA if she can show that she (1) was a bona fide purchaser for value, and (2) did not know and was reasonably without cause to believe that the property was subject to forfeiture.[14] Davis raised CAFRA's "innocent owner" defense against both of the government's bases for forfeiture. The government countered that CAFRA, *by its terms*, did not apply to its customs forfeiture claim.

On June 17, 2009, the court heard oral argument and ruled from the bench on the parties' cross-motions for summary judgment. Turning first to the general civil forfeiture claim, the court observed that there was "nothing in the record to suggest that [Davis] knew or had reason to know that this was a stolen work of art." It was thus "persuaded that the claimant here was a bona fide purchaser . . . for value . . . entitled for summary judgment" on the § 981 (a)(1)(c) claim.[15] It was not, however, receptive to Davis' argument that CAFRA's "innocent owner" defense also prevented forfeiture under 19 U.S.C. § 1595a (c), in spite of Davis' arguments that, among other things, the statutory language was ambiguous, and that common sense and good policy mandated an application of CAFRA's reforms to *all* forfeiture claims — including under the customs law — that were alleged together in the same action and premised on the same underlying offense (here, a violation of the National Stolen Property Act). While noting that "there may be something to [those] policy arguments," U. S. District Judge Richard J. Sullivan held that "the statute is pretty clear" in exempting the customs forfeiture statute from CAFRA's "innocent purchaser" defense. That claim thus proceeded to trial.

government's action was deemed timely because of the "absence" of the monotype between its theft and May 2003.

9 18 U.S.C. § 983(d)(3)(A).

10 Neither *Antique Platter of Gold* nor *Portrait of Wally* involved the resolution of a CAFRA-based "innocent owner" defense.

11 As with the customs law claim, the U.S. pointed to NSPA violations as the predicate "unlawful activity." The Complaint alleged two claims – Counts Two and Three – for forfeiture under 18 U.S.C. § 981(a)(1)(C). Count Two named as its predicate "specified unlawful activity" a violation Section 2314 of the NSPA, which, *inter alia*, prohibits the transportation of stolen property. Count Three alleged a violation of Section 2315 of the NSPA, which, *inter alia*, prohibits the possession of stolen goods that came into the United States after having been stolen.

12 Congressional Record, April 11, 2000.

13 18 U.S.C. § 983(i)(2)(A).

14 Davis also argued that, under CAFRA, the government was required to make its initial showing for all of the claims under a preponderance – not a probable cause – standard.

15 *U.S. v. The Painting Known As "Le Marche,"* No. 06-CV-12994 (RJS), *transcript of oral argument* (S.D.N.Y. June 17, 2009).

In January 2010, a jury found against Davis. She appealed, and on June 3, 2011, the Court of Appeals for the Second Circuit affirmed all aspects of the district court's proceedings.[16] In so holding, the court was cognizant of the equities involved, as well as the fact that its decision favored the claim of one innocent party over another. It was, it said, "in the unenviable position of determining who gets the artwork, and who will be left with nothing despite a plausible claim of being unfairly required to bear the loss." Yet, the "statutory language [was] unambiguous," the court noted, and while some members of Congress may have favored broadening CAFRA so that it mitigated the power of the customs law, their wishes were not in the majority.[17]

After the Second Circuit's ruling, the district court ordered *Le Marché* to be forfeited to the U.S. government, leaving us with perhaps two important lessons. First, there is hope that even after almost 30 years, stolen art can be found and returned. Second, owners of improperly imported art — including good faith purchasers — need to know that when the U.S. government decides to invoke the customs forfeiture law, chances are it will win.

FIGURE 1. LELIO ORSI (Italian, 1511-1587). *Leda ed il Cigno (Leda and the Swan)*. Oil on copper, 43 x 30 cm (approx. 17" x 11 ¾").

SWAN SONG FOR LELIO ORSI'S *LEDA*

In another recent customs law art forfeiture case, a federal district court in Manhattan — the same court as in the Pissarro case — in January ordered a 16th century oil painting by Lelio Orsi (1511-1587) to be returned to Italy. Yet unlike Pissarro's *Le Marché*, Orsi's *Leda ed il Cigno (Leda and the Swan)* **(FIG. 2)** was not actually stolen. The legal title of the Italian owner who shipped it was never challenged. Rather, he failed to obtain permission from Italian authorities to export the work and compounded that error by listing the work's "country of origin" as Great Britain instead of Italy on the customs form when it entered the United States in November 2006. So, when Italy asked the U.S. government to intercede saying that the work was part of its cultural heritage, U.S. prosecutors concluded that the owner, Edoardo Testori, was guilty of more than clerical gaffes

"Owners of improperly imported art — including good faith purchasers — need to know that when the U.S. government decides to invoke the customs forfeiture law, chances are it will win."

and instituted an *in rem* forfeiture action, grounded in part in the same government-friendly customs provision — § 1595a — used to recover *Le Marché*. The government claimed that Testori's actions were calculated to deceive "ICE" officials at the border, allowing the work to enter the U.S. "under the radar" so that it could be sold here.

The Complaint also alluded to the painting as having been "stolen," although it did not say how or why that was the case.[18] Because the forfeiture action went virtually unopposed, however, important legal distinctions, such as whether Italy's patrimony law vests ownership of such paintings in the state, thus allowing *Leda* to be deemed "stolen," or whether the work had merely been imported in violation of Italy's export laws (thus not considered "stolen" under U.S. law and not in itself a violation of U.S. law), were never considered. In the end, from ICE's point of view, it had recovered a "stolen" object "of a nation's cultural heritage."[19]

Leda and the Swan is one of only a few known easel paintings by Orsi (better known as a draughtsman and decorator) and one of the earliest known

16 *U.S. v. Davis*, No. 10-300-cv, *slip op.* (2d Cir. June 3, 2011).

17 The customs law "carve out" seems to have a pragmatic and procedural origin. As the Second Circuit explained: "CAFRA's backers ultimately decided to exclude Title 19 from the scope of CAFRA's reforms in order to prevent the bill from being 'bottled up in the unsympathetic House Ways and Means Committee, which has jurisdiction over bills affecting Customs.'" Quoting David B. Smith, *An Insider's View of the Civil Asset Forfeiture Reform Act of 2000*, Champion (June 2000), p. 29, n. 10.

18 *U.S. v. Leda ed il Cigno (Leda and the Swan)*, No. 08 Civ. 11275 (S.D.N.Y., filed Dec. 29, 2008).

19 U.S. Immigration and Customs Enforcement press release dated Jan. 14, 2011, available at http://www.ice.gov/news/releases/1101/110114newyork.htm

paintings on a copper support by *any* artist. It depicts the mythological seduction of Leda, wife of the king of Sparta, by Zeus, who visited her disguised as a swan. In 2003, Testori purchased the painting from a Milanese art dealer, coincidentally also named Orsi, and exported it three years later to the U.S. via Great Britain. He did not, however, apply to the local export office for a "certificate of free circulation," which, if granted, would have allowed the work to be exported legally. Specifically, under Italian law, no work more than fifty years old that is of "historic, artistic, archaeological, ethnographic, bibliographic, documentary or archival interest" — including privately owned artworks — can be exported without a certificate of free circulation.[20] The certificates are not liberally granted, however; applications are denied where the Italian government determines that the object's "leaving Italy would cause damage to State historic or cultural property.

Testori's electronically-filed U.S. Customs Entry Summary indicated that the painting's "country of origin" was Great Britain, not Italy, in spite of the fact that the Entry Summary Instructions state that "country of origin" is an item's "country of manufacture." [21]

U.S. prosecutors would later claim that Testori knowingly misstated the country of origin in order to deflect ICE officers' attention:

> It is generally understood by Customs (acting in close coordination with the Italian police . . .) that Italy has stringent laws prohibiting the export of artistic and archaeological property, that importers of Italian art . . . frequently misrepresent the country of origin on an entry form, and that exporters of such artworks frequently transship such items to their final destinations through a country that lacks stringent cultural property laws.[22]

Indeed, the U.S. government alleged that it was because of the Entry Summary inaccuracy that the work was not flagged or held up at U.S. Customs.

A year later, on January 24, 2008, *Leda and the Swan* sold at a Sotheby's New York auction (lot #36) of Old Master Paintings and Sculpture for $1,497,000 (with premium). In the meantime, the Office of the Public Prosecutor at the Ordinary Court of Rome began an investigation into whether Testori had broken Italian law when he exported the painting. The basis for its investigation — and its later decision to proceed against Testori — was that his actions had caused "serious damage to the historical and cultural heritage of Italy."

When the buyer learned of the Italian criminal investigation, he rescinded the Sotheby's sale. In April 2008 — well past the 90-day time limit for making changes to the form — an attorney for Testori (after having been questioned by an ICE attaché in Rome) e-mailed ICE a "corrected" Entry Summary, stating that the problem with the original document had been due to a "clerical error." Unconvinced, the U.S. government, which had been in discussions with Italian officials, seized the work in June 2008.

That December, the U.S. Attorney for the Southern District of New York brought a forfeiture action. As with the Pissarro forfeiture action, which was pending in the same district, the prosecutor invoked 19 U.S.C. § 1595a. In spite of describing the painting as "stolen" in the Complaint, the U.S. Attorney did not — as it had in the *Le Marché* case — reference the National Stolen Property Act ("NSPA") as a predicate U.S. law violation that would have made its importation "contrary to law."[23] Italy, in fact, never claimed to own *Leda* under its patrimony law.[24] Moreover, unlike the antiquities at issue in the *Steinhardt* and *Schultz*[25] cases, owned by Italy and Egypt respectively under patrimony laws, *Leda* likely would not be considered stolen, as opposed to illegally exported, under U.S. law.[26] To

20 Article 35, Protection of Items of Artistic and Historic Interest (Law No. 1089) (1939, as amended 1975 and 1998) (the "1939 Law").

21 The instructions further provide that "when merchandise is invoiced in or exported from a country other than that in which it originated, the actual country of origin shall be specified . . . ." See http://www.cbp.gov/xp/cgov/trade/trade_programs/entry_summary/ace/ In the case of an antiquity, however, U.S. Immigration and Customs Enforcement ("ICE") considers the "country of origin" to be the find-spot, that is, the place from which the object was excavated.

22 *Leda and the Swan*, Compl. ¶ 13.

23 Under the NSPA, it is unlawful to transport stolen goods worth more than $5,000 into the U.S. See 18 U.S.C. § 2314.

24 Under its patrimony law, Italy claims ownership of all archaeological "finds and discoveries." See Articles 43-50, Protection of Items of Artistic and Historic Interest (the "1939 Law"). Items removed in violation of Articles 43-50 are considered "stolen" from the Italian state. The Orsi painting at issue here is not a "find' or "discovery" under the 1939 Law, although it was subject to export restrictions, as discussed above.

25 *United States v. Schultz*, 178 F. Supp 2d 445 (S.D.N.Y. 2002), *aff'd*, 333 F.3d 393 (2d Cir. 2003); *cert. denied* 540 U.S. 1106 (2004).

26 *See, e.g., U.S. v. McClain*, 545 F.2d 988, 997-1000 (5th Cir. 1977); *U.S. v. One French*

FIGURE 3. ***Mummy Mask of Ka-Nefer-Nefer,*** **Egyptian, Dynasty 19 (1307-1196 B.C.). Plaster, resin, glass, wood, gold, and pigment, 21 1/16" x 14 9/16" x 9". Coll. St. Louis Art Museum.**

be sure, the misstatement of "country of origin" on the customs form *was* a violation of U.S. law and formed the basis for two other forfeiture claims in the Complaint.[27]

The particular issue of whether there was any basis for the government's reference to *Leda and the Swan* as having been "stolen" might have been ironed out had the prosecution faced any substantive resistance. As is commonly the case in forfeiture actions, however, it did not.[28] Only one party — a Portuguese corporation called Taggia CV-Consultadoria e Participacoes LDA — ever attempted to assert a claim for the painting.[29] In its Answer dated March 23, 2009, Taggia denied the government's allegations and asserted the affirmative defenses that it was an innocent owner, and that the seizure was "grossly disproportionate" and thus violated the Eighth Amendment to the Constitution. Taggia, however, abandoned its claim a mere two months later.

In January this year, the U.S. District Court for the Southern District of New York ordered the painting's forfeiture. ICE's press release, issued two weeks later, trumpeted the return of "stolen objects of a nation's cultural heritage to their rightful owners" and emphasized that property "stolen abroad and later brought into the United States is subject to forfeiture." IFAR has been told that the work is expected to go back to Italy this fall and will become the property of the Italian government.

"Unlike Taggia in the *Leda* case, the St. Louis Art Museum ("SLAM") is ready and willing to fight to keep an ancient Egyptian mummy mask . . . which the U.S. and Egyptian governments believe was stolen from an Egyptian storage facility . . ."

MUMMY MASK MUST GO SAYS ICE

Unlike Taggia in the *Leda* case, the St. Louis Art Museum ("SLAM") is ready and willing to fight to keep an ancient Egyptian mummy mask that it purchased for approximately $500,000 in 1998 from New York-based dealers Hicham and Ali Aboutaam. The Mask of Ka-Nefer-Nefer **(FIG. 3)**, which the U.S. and Egyptian governments believe was stolen from an Egyptian storage facility between 1966 and 1973 and smuggled into the U.S., is the subject of an *in rem* customs forfeiture action brought in March by the U.S. Attorney, Eastern District of Missouri.[30] The question now before the court is whether SLAM will be *able* to do anything to prevent the forfeiture. This is because the U.S. is seeking to exclude the museum from court proceedings by arguing that it lacks standing.

IFAR Journal first reported on the dispute between SLAM and Egyptian officials over the fate of the mummy mask in early 2006.[31] At that time, Egypt had requested that SLAM return the mask, which had been excavated and documented by an Egyptian archaeologist in 1952. SLAM — which had conducted provenance

1919 Vehicle, Type Henry Rougier, No. 08-CV-01825) (W.D. Wash., filed Feb. 10, 2009). For a scholarly discussion of the distinction under the NSPA between export restriction violations and national claims of ownership pursuant to patrimony laws, see Stephen K. Urice and Andrew L. Adler, *Resolving the Disjunction between Cultural Property Policy and Law: A Call For Reform, Rutgers Law Review,* Vol. 64, no. 1, University of Miami Legal Studies Research Paper No. 2011-10, available at http://ssrn.com.

27 Counts One and Two seek forfeiture under 18 U.S.C. §§ 542 and 545. Section 542 allows for forfeiture of merchandise imported "by means of any fraudulent or false declaration . . . or by means of any false statement." Section 545 makes it a violation of U.S. law to fraudulently or knowingly import an item "knowing the same to have been imported or brought into the United States contrary to law."

28 Urice and Adler, *op. cit.,* note this phenomenon in two other cases – the *French Automobile* case and *U.S. v. One Ancient Egyptian, Yellow Background, Wooden Sarcophagus* (S.D. Fla. Dec. 30, 2009) in which forfeiture occurred even though prosecutors never alleged NSPA violations: "because [prosecutors] encountered no opposition from the claimants, both cultural objects were ultimately returned to their country of origin."

29 In its Answer, Taggia claimed to be the owner of the painting, but the basis for that ownership was never spelled out in court documents.

30 *U.S. v. Mask of Ka-Nefer-Nefer,* No. 11-cv-00504 (E.D. Mo. filed March 16, 2011).

31 See Jack A. Josephson, "Egypt and St. Louis Museum Battle Over Mask," *IFAR Journal,* Vol. 8, no. 2 (2005/2006), pp. 7-8.

research prior to the purchase[32] — was resistant. In early 2011, the U.S. government stepped in with a one-count Complaint for forfeiture that relies exclusively on 19 U.S.C. § 1595a. As with the *Leda* case, the Complaint in *Mask of Ka-Nefer-Nefer* did not reference the NSPA, but rather, contended simply that the mask was subject to forfeiture simply because "it was stolen, smuggled, or clandestinely imported" into the United States "contrary to law."

> The U.S. Attorney . . . took the bold — and to say the least, unusual step — of moving to block SLAM from participating in the case *at all*."

In May, SLAM responded with a Motion to Dismiss. In spite of its provenance research and good faith belief when it purchased the mask that it was not stolen, the museum did not — after the decision in *Le Marché* — raise a "good faith purchaser" defense. Rather, SLAM asserted that: (1) the mask had entered the United States prior to the passage of Egypt's patrimony law (Law 117) in 1983, and thus was not at the time "stolen" from the Egyptian government under any "national declaration of ownership"; and (2) the facts alleged in the Complaint — that Egyptian authorities noticed that the mask was missing in 1973, and that their only record of it prior to that was a 1966 inventory — were too vague to support a conclusion that it had been "stolen" in the traditional sense. Rather, SLAM contended, the facts left open the possibility that the mask had been gifted by the Egyptian government to its excavator, who later sold it to art dealers, a hypothesis that Zahi Hawass, Egypt's former head of the Supreme Council of Antiquities, vehemently dismissed.

SLAM also argued that the Complaint was untimely under 19 U.S.C. § 1621 and that the government's action should be barred by laches. Specifically, it noted that in December 2005, the Museum Security Network — a cultural property list-serve — had notified the FBI's Art Theft Program that "the Saint Louis Art Museum possibly [had] an Egyptian mask that was stolen circa 15 years ago from depositories of a museum in Saqqara, Egypt." The U.S. government did not commence its legal action, however, until 2011 — more than five years later and, according to SLAM, beyond the statute of limitations.[33]

The U.S. Attorney did not respond to those arguments in full, on the basis that that they were not appropriate considerations so early in the case. Instead, it took the bold — and, to say the least, unusual — step of moving to block SLAM from participating in the case *at all*. Its theory: that ownership of the mask by the museum was "*legally impossible*" because the mask "is effectively contraband in the hands of the Museum." (Emphasis in original). Thus, argued the U.S., SLAM's claim for the mask is akin to a claim for ownership of "a kilogram of cocaine," and without a colorable ownership interest, the Museum had no right to join the litigation.[34] SLAM, of course, took issue with that characterization, saying that its purchase and possession of the mask are indicia enough for a claim of ownership, and that in any case, the mask is in no way analogous to contraband that is illegal to own *per se* because — as the government had admitted — the mask *is* capable of being legally owned.[35]

No date has been set for argument on either of the pending motions. Regardless of whether SLAM wins or loses, however, its decision to fight to keep possession of the mask — a fight criticized in many quarters — promises to put the customs forfeiture statute to the test, as it was intended, by way of an adversarial process.

• • •

— S.F. AND M.M.R.

32 See *id.* According to SLAM's court papers, its due diligence prior to the purchase included inquiries to Dr. Mohamed Saleh, Director of the Museum of Egyptian Antiquities in Cairo; Interpol; and the Art Loss Register. Because, Egyptian authorities had never reported the mask stolen, however, none of those sources identified the mask as stolen. As Josephson noted in *IFAR Journal*, provenance research into looted Egyptian items can be challenging for museums like SLAM "with comparatively small collections of Egyptian art" because they "rarely have an Egyptologist on staff capable of making detailed inquiries regarding provenance."

33 See footnote 8.

34 As with the two other forfeiture cases discussed in this article, the *Mask of Ka-Nefer-Nefer* case was brought as an *in rem* proceeding against the art object itself. In *in rem* proceedings, parties who can show an ownership interest are allowed to intervene in order to protect their rights.

35 As the U.S. pointed out in its motion to strike, Egyptian Law No. 215 of 1951 allowed for private ownership of antiquities in cases where they were (1) privately owned at the time of the law's enactment; (2) given to the discoverer by the state as partage; (3) given away or sold by the state; (4) imported into Egypt; (5) dated from Christian times and registered but not claimed by the state; and (5) sold by Egyptian museums.

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LONDON NEW YORK SINGAPORE FREEPORT

THE RIGHTS AND RISKS OF EXPERTS IN FRENCH AND AMERICAN COURTS

VAN KIRK REEVES*

When a collector is informed by an auction house that a work of art cannot be sold as the work of the Master, or when the museum to which he wishes to give the work does not want it and brands it a dud, the reaction is fury and a quick call to the lawyer to "get me my money back: sue the auction house or dealer who sold it to me."

The auction house or dealer replies that it relied on an Authority who would not confirm the authenticity of the object, thus shifting the spotlight and potential claims of legal liability onto the Authorities.

"The courts, are often called upon to enter into the area of what should be reserved for scholarship."

These Authorities are an exotic bunch. Some are trained art historians who have made a lifelong study of an artist's work; others are dealers, often the artist's principal dealer during his lifetime, such as the late Klaus Perls for Alexander Calder, or a dealer specializing in that artist's period; still others are family members of the artist (think Claude Picasso) or other party who has the *droit d'auteur*, the artist's pecuniary and moral rights under French law. Often they are preparing, or have already published, a catalogue raisonné, a study in one or more volumes documenting the artist's total output or work in a particular medium. All have made major commitments to reviewing works purported to be by the artist.

For virtually every artist, there is at least one Authority whose opinion as to authenticity, whether offered free of charge or for a fee, is accepted by auction houses and dealers. But where there are *multiple* accepted Authorities, they can disagree as to whether a work is authentic, with the economic value of the disputed work varying in accordance with the marketplace's appraisal of the value of that expert's opinion.[1]

The general public is mostly unaware of, and even some collectors have little idea as to, the influence and power exerted by accepted Authorities and the fact that they often do not seek the responsibilities that are placed upon them.

Such Authorities may change their minds as scholarship and technical analyses advance. The Rembrandt Research Project, for example, a group of Dutch scholars that has been reviewing the work of Rembrandt van Rijn since 1968, has twice changed its opinion concerning the fabulous *Polish Rider*, one of the greatest treasures of the Frick Museum in New York.[2] And consensus may change as one Authority is replaced by another.

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1 The abundance of documentation on Modigliani, for example, has not brought comfort to the market for the artist. Some dealers and auction houses are only satisfied that a work is authentic if it is confirmed in the first volume of Ceroni's catalogue raisonné: Ambrosio Ceroni, *Amedeo Modigliani, peintre,* Milan: Edizioni del Milione, 1958.

2 *The Polish Rider*, most likely painted in the 1640s, was found in 1897 in Poland. In 1982, the Rembrandt Research Project reattributed the work to one of Rembrandt's disciples, Willem Drost, until 1996, when Ernest van de Wetering, chairman of the RRP, changed his mind and included the *Rider* in the new edition of the artist's catalogue, as well as does Simon Schama in his 1999 book *Rembrandt's Eyes*. For more information on the changes of opinion about the attribution of certain Rembrandt works, consult:

- E. van de Wetering, "Connoisseurship and Rembrandt's Paintings: New Directions in the Rembrandt Research Project, Part I" in *The Burlington Magazine*, Vol. CL, February 2008.
- Christopher White, "Review of *'A Corpus of Rembrandt Paintings'* Vol. I" in *The Burlington Magazine*, Vol. CXLVIII, February 2006.
- E. van de Wetering, "Thirty Years of the Rembrandt Research Project: The Tension between Science and Connoisseurship in Authenticating Art," *IFAR Journal*, Vol. 4, no. 2, 2001.

It should be considered normal that scholarship and technical methods would result in changes in opinion as to the authenticity or attribution of a painting or a sculpture, and if scholarship in matters of fine arts were as academic as scholarship in history, Authorities would be confined to the ivory tower of academia. But their opinions have a dominant influence on the monetary value of art, given the decrease in value when a work is contested and the utter worthlessness of an object that is held not to be authentic. The courts, therefore, are often called upon to enter into the area of what should be reserved for scholarship.

DIFFICULTIES IN ESTABLISHING AUTHENTICITY

While certain works can be established as false because of the materials that are used, a decision that a work *is* authentic can generally only be established using subjective criteria. If you ask an expert widely recognized as "the" specialist on an artist as to how he proceeds to identify a work as being by that artist, he would answer that he simply "knows": "The initial thing is just that immediate reaction, as when we're recognizing the face of a friend in a crowd," Martin Kemp, a noted Leonardo scholar, recently explained. "You can go on later and say, 'I recognize her face because the eyebrows are like this, and that is the right color of her hair,' but, in effect, we don't do that. It's the totality of the thing. It feels instantaneous."[3]

The issue becomes particularly complex where an artist has rejected certain objects that he had previously declared were his creation. An item can also be challenged as a work product, or a project that had not succeeded,[4] or a project that is still incomplete.[5] An author can easily control his drafts, so that only a work which he feels is complete and worthy of his name may be published; for an artist, this is not so simple.

Objects that the artist never completed, or that he retained as a reminder of a failure in his creative spirit, may be proposed in the art market.[6] These, if retained for historical or study purposes, should not be confused with the acknowledged work of the artist, or presented in the marketplace as such.

Confusion is even more likely where artists have assigned to assistants some of the responsibilities of their artistic intentions. Many Old Masters worked with a studio of apprentices, who were responsible for the execution of all or part of the painting under the authority of the Master. The Rubens Committee is regularly called upon to try to distinguish between the hand of Peter Paul Rubens and those of his assistants, with the market assigning much greater value to works that are perceived to have more of Rubens's hand in their creation. For Old Master works, the economic difference of a work *attributed to* an artist, or to the atelier of an artist, or by the artist himself is stunning.[7]

3 David Grann, "The Mark of a Masterpiece," *The New Yorker*, July12, 2010, quoting, among others, Martin Kemp. As it is difficult for the human mind to trust only one opinion when many millions of dollars are at stake, many have tried to propose scientific methods based, among other things, on digital fingerprints or DNA. But the imagination of counterfeiters continues to counteract every new scientific method. The eye of the specialist remains the surest way to authenticate a work, even though the arbitrary nature of such a decision is unsatisfactory.

4 *CA Paris*, 6 mars 1931: The painter Charles Camouin, unsatisfied with one of his works, tore it up and threw it away. The pieces were recovered by a broker and ended up in an auction. The artist, upon learning about the sale, asked the courts to seize the pieces and destroy them. The court allowed this on the basis that his "right to divulge" had been violated.

5 *CA Paris*, 1ère Ch., 19 mars 1947: The artist Georges Rouault sold unfinished works to his dealer Ambroise Vollard, who later resold them. Rouault sued. The *Cour d'appel* decided that the artist did not consider the works completed. As these works were unfinished in the artist's opinion, the dealer had no right to sell them. The dealer did not have full rights to the work.

6 Claude Monet destroyed many of his works. As underlined by Madame Maufus, Director of Catalogues at the Wildenstein Institute, during a meeting, these works were never considered by the Master to be completed works. However, it was decided that they would be included in the catalogue raisonné written under the direction of Daniel Wildenstein.

7 The sales record for an oil painting by Peter Paul Rubens for which there was no doubt about the authenticity reached almost $70 million (Sotheby's London, *The Massacre of the Innocents*, 10 July 2002). One must divide this amount by 200 to find the sale's record for an oil *attributed* to the Master (Sotheby's Amsterdam, *Portrait of Maria Anna of Austria, Infanta of Spain, Later Queen of Hungary*, $500,000, 5 July 2008). A work from the Master's workshop can be acquired for only a few tens of thousands of dollars (old record: *Portrait of Philip IV of Spain/ Portrait of Isabella of Bourbon*, $35,000, Phillip's London, 5 December 1989.) Source: Artprice.com

"The one common denominator of all these litigations in France and the United States is cost."

In modern times, as the act of creation has become more varied, and as assistants have been used to undertake much of what the artist traditionally did himself, Authorities may face even greater challenges in establishing what should be considered authentic.

In the creation of certain works, Conceptual artist Alighiero Boetti (1940-1994) chose to have what the uninformed might call ballpoint pen scribbling undertaken under his authority by assistants. Such working methods have brought challenges to certain of his works, as in a recent lawsuit in U.S. federal court between the Sperone Westwater Gallery in New York and the Boetti Archive in Italy.[8]

If the situation is complicated for paintings, it is even more complex for prints, photographs and three-dimensional works.[9] Lithographs have their own problems, as many artists do not supervise the printing of their works. One can wish for the simplicity of the phrase attributed to Frank Lloyd, "If it sells, it is art," but authorities are being called upon to make decisions that are not easily given.

When an object is offered to an auction house, dealer or, in many cases, a collector, the first consideration is to establish whether it is authentic. Often this is easily done by referring to the reference to it in the catalogue raisonné, or to a certificate previously provided.

In many cases, the review will be undertaken by an auction house or dealer internally. Museums are sometimes prepared to provide their resources for such work, and independent organizations are often called on as well.

IFAR itself, which provides in-depth research and utilizes the expertise of specialists around the world, has a distinguished history of reviewing works of art and giving opinions that are highly valued in the marketplace. Such work may preclude the need to go directly to an Authority who may not have the time or inclination to provide the analysis a client may wish or need, and certainly may not be prepared to consider a work in a time frame necessary to conclude a transaction.

Where this path is not chosen and in the absence of irrefutable proof, the object (or a photo of it) may be referred to an Authority.

LITIGATION AGAINST AUTHORITIES

Such consultations are fraught with peril for the Authority. An unauthenticated work is a dud; no auction house will touch it, no dealer will handle it; the object is worthless.

As collectors are rarely impoverished, they often turn to extremely expensive litigation, citing conspiracies between experts, heirs, authors, publishing houses and auction houses,[10] to seek the judgment of courts

8 *Sperone Westwater Inc. and Sperone Westwater Gallery LLC v. Archivio Alighiero Boetti, Agata Boetti, Matteo Boetti and Annemarie Sauzeau*, United States District Court, Apr. 1, 2008, 08 CV03263. Eight years after Boetti's death (1994), the New York gallery Sperone Westwater held an exhibition of 15 Boetti works and sent the catalogue, among other places, to the Boetti Archive in Italy. The Archive expressed concern about one of the works exhibited. This work was brought to Italy to be examined, and the Archive opined that it was not authentic. The gallery removed it from the show. Nine other works were sold by the gallery. However, in 2004 the Archive wished to review again some of the other works in this exhibition, including one that had been purchased by the Art Institute of Chicago. Sperone Westwater sought a declaratory judgment that the Archive did not possess the moral rights of Alighiero Boetti and requested damages for injuries to the gallery's business and reputation, alleging breach of implied covenant of good faith and fair dealing, negligent misrepresentation and interference with business relations. The proceedings were settled by negotiation between the parties. The author represents the Archivio Boetti; representing the Archivio in the litigation were Ronald D. Spencer, Gary D. Sesser and Judith M. Wallace of Carter Ledyard & Milburn LLP.

9 To clarify the law on posthumous editions, France enacted the Law on Author's Rights and Similar Rights of August 1, 2006, also referred to as DADVSI. To be considered an original and not a reproduction, three conditions must be met: the work must be done in a limited edition; it must be cast from the plaster created by the artist and not from one done by the workshop of the foundry (*pâtes d'atelier*); and the edition must be made by the artist or under the artist's control.

10 *Kramer v. Pollock-Krasner Foundation*, 890F. Supp. 250 (S.D.N.Y. 1995): David Kramer, fine art and antiques dealer, bought a painting privately for $15,000, which he alleged could be worth $10,000,000 if authenticated as a Jackson Pollock. He contacted Christie, Manson & Woods International and Sotheby's, who said they would sell it only if authenticated by the Pollock-Krasner Authentication Board, which refused. Kramer then sued the Board as well as the auction house, claiming antitrust violations from an alleged antitrust conspiracy begun at Pollock's death in 1956. The suit was dismissed.

to compensate them for the financial loss and the humiliation of having their object rejected.

The one common denominator of all these litigations in France and the United States is cost. The plaintiff is committed to establishing the authenticity of an object in view of its extraordinary value if it is good and its worthlessness if it is not, so for plaintiffs litigation costs are a means to an end. For defendants, particularly experts and authors of catalogues raisonnés who do not have a collection of the works of the artist to protect, the cost is a terrible burden. And often, even in the event of a victory, there is no possible compensation for the costs incurred.

Why, then, would a sensible person choose to undertake such a task and become an Authority or author a catalogue raisonné? After all, authors devote years to preparing a catalogue raisonné. Publishers are reluctant to accept them for publication, as sales often do not cover costs. Royalties seldom justify the commitment made. Authors are badgered by auction houses, dealers and collectors to reach a rapid and definitive decision concerning a submission. The customary fees for such inspection, if indeed there is a charge, are derisory in view of the interruptions such inspections cause to the Authority's principal work.

As a final recompense, the Authority has the threat of litigation always hanging over his head, where defense costs can easily mount into the hundreds of thousands of dollars. It would not seem a desirable career choice.

Still, the art market depends on the willingness of such authors and other Authorities whose judgment is accepted in the marketplace to establish the credibility of works of art. The interest of the Authority in being consulted lies in his having access to all objects considered to be the Work of the artist so that his knowledge of the artist is exhaustive.

THE TREATMENT OF CONTESTED WORKS IN FRENCH AND AMERICAN LAWSUITS

An analysis of recent case law in France and in the United States shows that a great deal of court time and litigation efforts have been invested by plaintiffs' attorneys seeking to require that Authorities recognize works that collectors hope to sell. The courts in both the United States and France have given great weight and thought to the problems, but the results, aside from the extraordinary costs that Authorities have had to bear, have changed nothing in the art market.

"An analysis of recent case law in France and in the United States shows that a great deal of court time and litigation efforts have been invested by plaintiffs' attorneys seeking to require that Authorities recognize works that collectors hope to sell....[But] lawsuits have failed to provide collectors with the comfort that they seek."

Lawsuits have failed to provide collectors with the comfort that they seek. In one interesting example of the vigor with which a collector will litigate, a case was brought against Wildenstein & Company, the New York art gallery, and then in France, against the Wildenstein Institute, the charity dedicated to art research and the publication of catalogues raisonnés, seeking damages for the fact that Marc Restellini, an art critic and the author of a forthcoming catalogue raisonné to be published by the Wildenstein Institute, chose to warn Phillips auction house (on Wildenstein Institute letterhead) that an object being offered for sale and claimed to be by Modigliani **(FIG. 1)** would not be included in his catalogue raisonné.

The frustrated American collector, Moshe Shaltiel-Gracian, first sued in the United States in 2001[11] to have the Wildenstein art gallery in New York

11 *Shaltiel Gracian v. Daniel Wildenstein*, November 27, 2001, Supreme Court, Appellate Division, First Department, New York, 288 A.D. 2d 136, 733 N.Y.S2d 400, 2001 N.Y. The work in question was pulled from the Phillips London sale of 20th Century European Paintings, Drawings and Sculpture, June 23, 1997 (lot # 56).

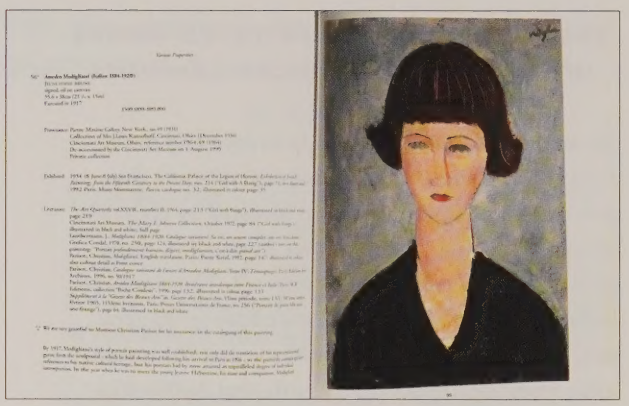

FIGURE 1. AMEDEO MODIGLIANI(?), *Jeune Femme Brune.* The painting was pulled from a 1997 Phillips auction when its attribution was questioned. A legal battle ensued.

treated as the agent of the Wildenstein Institute in France. The fervor of litigation took the case first to the appellate division and then to the appeals court of the State of New York, where from trial through final appeal, New York respected the position that a French not-for-profit institute dedicated to art research and located in Paris was not the agent of Wildenstein & Company, an art gallery in New York, and that therefore the gallery could not be held liable for claims against the Institute, even though Wildenstein family members are senior executives of both institutions.

Mr. Shaltiel-Gracian then turned to the French courts to find his justice, also in a case that went from trial court to appeals court.[12] The French courts held that the publisher of a catalogue raisonné could not be held liable for the judgments of an author, particularly where the catalogue raisonné had not yet been published. The French courts held that the rights of an author to express his opinion, in the absence of proof of malicious intent or negligence, gave no cause of action against the publisher. This latter point was *dicta,* as the Court did not need to reach this point to find that the Institute was not liable, and such a gratuitous ruling would appear to indicate the Court's displeasure at being called on to rule on the facts submitted.

The most curious aspect of this Modigliani case was that the plaintiff did not request that the French court determine whether the object was authentic by appointing an expert to give an opinion on this point. Under French procedure, such an expert, normally drawn from the list of experts appointed by the appeals court of Paris or the *Cour de cassation*, which is France's highest court, acts as a Master and has the authority to establish whether a work is authentic or not.

The Master considers all the information provided by the interested parties to the lawsuit to determine a work's authenticity, whether it be written evidence or testimony by the experts chosen by the interested parties. The expert may, in addition, consult with whomever he wishes and also do his own research. The proceedings are informal, but the lawyers of all parties have the right to be present when testimony is given and receive copies of all documentation submitted by the parties. The expert's opinion is then given to the court and is customarily adopted by the court as its decision on the issue of authenticity, binding on all parties.

Many feel that this procedure gives rise to better judgments than in the common law system, such as in the U.S., where each party presents its own experts to be evaluated by a judge or jury who do not have the training to make such judgments.

The French judicial service has perhaps rendered its most definitive ruling on the duties of Authorities in the Atlan matter, where in a six-year struggle over the duties of an Authority, the matter was taken twice to the *Cour de cassation*, the highest court. The disappointed collector cited the author of the catalogue raisonné and the widow of the artist Jean-Michel Atlan (1913-1960), as holder of the moral rights,[13] claiming they all had a duty to declare the object belonging to the plaintiff to be the work of Atlan, a recognized French abstract artist whose works now trade in the tens to the hundreds of thousands

12 *CA Paris*, 25ème ch., Sect. A, 2 février 2007, *Shaltiel Gracian c/ Association Wildenstein Institute.*

13 Moral rights are part of the artist's rights, which are very strong and protected in French law. Moral rights include: the right of disclosure and completeness; the right to withdraw; the right of the artist to assert that he or she is the creator of the work (the right of paternity); and the right of integrity. After the artist's death those rights may be left to the heirs to be protected by them as if they were the artist himself, or in certain cases may be left by will. As opposed to intellectual property rights, moral rights are not time-limited. Such rights include the right to be a plaintiff in a French law suit to protect the Work of the artist.

of dollars. He died in 1960, leaving his widow as the only holder of his moral rights. Madame Atlan, however, gave Monsieur Poliéri (who published a catalogue raisonné of Atlan's work in 1996) the "power to establish authenticity certificates."

The plaintiff purchased a work by Atlan in 1965 and wished to sell it in 1997. He asked for Monsieur Poliéri and Madame Atlan's opinion concerning the work's authenticity. They did not answer, even after a notice in 2000. A court assigned expert, after studying the work, concluded that it was by Atlan's hand. However, Monsieur Poliéri and Madame Atlan still refuted its authenticity without explanation.[14]

> "Under French procedure, an expert, normally drawn from the list of experts appointed by the appeals court of Paris or the *Cour de cassation*, . . . has the authority to establish whether a work is authentic or not. . . . Many feel that this procedure gives rise to better judgments than in the common law system, such as in the U.S., where each party presents its own experts . . ."

Twice this case was brought before the *Cour de cassation*. First, in 2005 (2ème chambre civile, 10 nov.), the court implicitly agreed with the first judgment (TGI Paris, 13 sept. 2002), which had said that the holder of the moral rights could not be forced by a court decision to recognize the authenticity of a work of art. The court ruled that a refusal was not an offense, but also ruled that the author of a catalogue raisonné is only liable in case of a gross negligence, and no such negligence was found in this case. The case was therefore sent back to another court of appeals and then again to the *Cour de cassation* in 2008 (1ère ch. Civ. 13 mars), which ruled that refusing to insert the work in future publications by the author is impermissible. The *Cour de cassation* also said that the obligation of an author to list a work in the future editions of the catalogue raisonné is proportionate and necessary to the purpose of a catalogue raisonné, to provide a complete and objective listing on an artist's work.

Under French procedure, the French highest court does not give a judgment on the merits, but merely gives a judgment as to whether all aspects of the law were properly viewed by the appeals court. Where the *Cour de cassation* determines that that there are issues that should have been dealt with by the appeals court or where they feel that the judgment of the appeals court has not properly reflected the law, then the court voids the judgment of the appeals court and sends the case to another appeals court for further consideration.

Five proceedings later,[15] and in reading the judgments one is hopeful that it is now a matter of established

14 Some attorneys advise Authorities not to give reasons for their rejections of an object. Such counsel feels that once one has entered into a dialogue on the subject, the Authority's reasoning can be picked apart, leaving the Authority in a more exposed position. Other counsel attempts to deal with the issue on a case by case basis.

15 For legal eagles who wish to examine the decisions in greater detail, the following summary may prove sufficient:

Trial Court: *TGI Paris*, 13 septembre 2002, 3ème ch., 2ème sect.
The holder of a moral right cannot be compelled by law to acknowledge the authenticity of a work in the absence of a wrong; the author of a catalogue raisonné is only liable if there is gross negligence as his work is his own creative endeavor (*oeuvre personnelle privée*)

Appeal Court: *CA Paris*, (1ère Ch. Sect. A) 3 février 2004
The possession of the moral right does not give its holder a right to be selective in the authentication of works. Nonetheless, the court cannot compel the holder to deliver a Certificate of Authenticity. Where an expert acknowledged as the author of a *complete* catalogue raisonné refuses to acknowledge the authenticity of a work which has been established by a Judicial Proceeding without explanation of his motive, his behavior is wrongful and subject to damages.

Highest Court: *Cass.*, 2ème Civ , 10 novembre 2005
In order to bring judgment against Mr. Poliéri (the author) and Mrs. Atlan (the holder of the moral rights) on the basis that they abused their rights, the appeal court neglected to check whether there was bad faith or wrongful arbitrariness. The highest French court sent the case back to another appeal court to make that determination.

Second Appeal Court: *CA Versailles*, 12 janvier 2007
The judge examined whether the use of the moral rights by the heirs of the artist was abusive, if this abuse caused a wrong and whether it was done with the intention of disparaging, with wrongful arbitrariness or bad faith. The cataloguer, if he is free to present his work, in accordance with his views in fulfilling his objectives, has a duty of objectivity and exhaustiveness. If he has knowingly omitted to cite a work that has been recognized (judicially) as authentic, he has committed a wrong.

Second Hearing Highest Court: *Cass.*, 1ère Civ, 23 mars 2008
The refusal by the author of a catalogue raisonné to agree to insert in future editions of the catalogue a disputed work is a speculation and does not in itself constitute a wrongful failure. The obligation for the author of a catalogue raisonné to include a work in its next edition of the catalogue raisonné is proportional and necessary for the inclusivity and objectivity sought by the catalogue raisonné.

law, it is clear that the holders of the moral rights have no duty to authenticate and provide documentary authentication of objects claimed to be by the artist and submitted for review. However, where the French court has established that the work is authentic, the author of the catalogue raisonné *must* include that work in new editions of the catalogue raisonné and cannot say that the work is not by the artist.

It would appear, nonetheless, that the author is allowed to express his own opinion when publishing the opinion of the court, to say, for example, that the brushwork was not typical of the artist, or that there was no other example of the subject matter by the artist. As the marketplace relies on Authorities, not courts, to make judgments on authenticity, such "works" are effectively worthless.

French law reaches even further to protect moral rights against their abuse by their holders after the death of the artist. Article 20 of the Law of March 11, 1957 provides that in the case of notorious abuse or non use by the representatives of a deceased author of their rights, the court has the right to order whatever measures appear appropriate – a very generous legislative grant of authority to the judicial branch. Once the hurdle of notorious abuse is overcome, the court has the right to determine what the artist would have wished and order that it be done.

Mrs. Foujita was the legal heir of her husband, the French-Japanese artist Léonard Tsugouharu Foujita (1886-1968), in the absence of a will. She refused on several occasions to permit a publisher and its authors to publish a book reproducing a number of works of the late artist. No explanation was given, but the refusal may have been motivated by the fact that such publication would include Foujita works depicting women with whom it was thought he had affairs.[16]

The authors and the publisher went to court,[17] claiming under this same Article 20 that the refusal to allow publication without explanation constituted a notorious abuse of the widow's discretion in exercising the moral rights she had inherited. The appellate court ruling on March 3, 1987 felt that no abuse had occurred because the widow had secured an agreement with Hachette Japan, a subsidiary of the Hachette publishing house, on January 26, 1987, calling for a "collection of works" of the artist to be published in Japan with the assistance of the widow. The court was unmoved by the fact that this book would not be distributed in France.

The highest court, however, ruled that "any artist would want to be known as widely as possible" and sent the matter to another appeals court for reconsideration. Such a mechanical ruling to what all artists wish ignores the desire of certain artists, such as Franz Kafka, to have their work and work product destroyed. The appeals court on reconsideration held that the abuse consisted not in the refusal to have the work of the artist published, but in discriminating as to what images could be reproduced.

The decision appears sensible, but it does constitute the judiciary establishing what the artist wished after his death, or perhaps the even more elusive notion of what the artist *should* have wished after his death.[18]

For those who feel that these solutions provide a happy ending, one cannot be optimistic that these judgments will assuage the enthusiasm of litigants, particularly where counsel chosen by the litigant does not appreciate how the art market functions.

Under French rules, the author of a catalogue raisonné and the holder of the moral rights have legally enforceable duties in regard to the work for which they have undertaken responsibility, but New York courts, in a recent decision involving the Alexander Calder Foundation's refusal to state an opinion about

16 This issue was discussed by Me. Régis Cusinberche at the Third International Seminar sponsored by *Art et Droit*, organized by the Paris Bar in collaboration with the College of Lawyers of Malaga and the College of Lawyers of Barcelona, and held in Paris, France on June 10, 2011, on the subject of "The Influence of the Estates of Important Creators on the Evolution of the Law of Art."

17 *CA* March 3, 1987; *CC Civ* 1, February 28, 1989; *CA Rennes*, November 16, 1990.

18 Trust and estate lawyers and surrogate courts may be more attuned to such speculation where consideration is given to issues of undue influence and the capacity to make testamentary decisions.

a work submitted for review,[19] have ruled that the only duty is to "consider" authentication requests. New York law does not require authentication organizations to respond to every request or indeed to *any* request. Mrs. Foujita might well have had the quiet she sought had her case been decided under New York law.

As American courts have *usually* refrained from ruling as to whether a work is authentic, industrious plaintiffs' lawyers have sought other legal theories on which to seek compensation for the negative opinion of an Authority.

In *Kramer v. Pollock-Krasner Foundation*,[20] a disappointed collector included Sotheby's and Christie's along with the Foundation, the Authentication Board, and Yale University Press, the publisher of the Jackson Pollock catalogue raisonné, as named defendants for having established a monopoly for the sale by auction in New York of the works of Jackson Pollock. Several museums were named as co-conspirators, although not defendants. The court worked through the allegations to dismiss the case on the basis that the plaintiff had failed to show that an unreasonably restrained market or monopoly existed. The other complaints were also dismissed, without the court having to consider whether the object in question was the work of Jackson Pollock.

Perhaps the most ambitious, if not the most doomed, case in New York law involved an apparently counterfeit Georgia O'Keeffe watercolor. The plaintiff, the unhappy owner, brought an Authority, the Georgia O'Keeffe Foundation, and even the National Gallery of Washington, D.C., co-publisher of the O'Keeffe catalogue raisonné, into the limelight with allegations of "fraud, negligent misrepresentation, 'Consumer Fraud Act,' ... respondeat superior, the Magnuson-Moss Warranty Act, breach of contract, negligent supervision, breach of warranty, failure of consideration, partnership/joint venture, civil conspiracy, violation of public trust, [and] lack of due diligence (sic)."[21] In granting the motion to dismiss with prejudice and without leave to amend, the Clerk of Court was "directed to terminate all pending motions and *close* [note the court's emphasis] the docket for this case."[22] All very amusing as a plaintiff fumbled about trying to make a case, but the Authority, Barbara Buhler Lynes, author of the O'Keeffe catalogue raisonné, had to respond to the court. The cost, stress and time required of a party who had no financial interest in the result, but a reputation to lose, is very dissuasive for those prepared to put their knowledge and experience on paper to expand our knowledge of a major artist and her works.

"... The author of a catalogue raisonné and the holder of the moral rights have legally enforceable duties [in France] in regard to the work for which they have undertaken responsibility, but New York courts ... have ruled that the only duty is to 'consider' authentication requests."

One case, though, does stand out in American law where a judge sought to pre-empt the decisions of an acknowledged authority and declared a "work" as authentic. In so doing, he lacked the safeguard of the French legal system, where the court-appointed expert has an extensive background in art history and how authentication is established.

In *Greenberg Gallery v. Bauman*,[23] a federal court judge in Washington, D.C. discounted the testimony of Klaus Perls, Alexander Calder's esteemed dealer for thirty years, that a sheet metal and steel mobile said to be by Calder **(FIG. 2)** was a fake. A ten-minute review of the object was sufficient for Mr. Perls to call it that.

For the authenticity of the work, the opposing party called on Linda Silverman, formerly director of Sotheby's contemporary art department and more recently a dealer. She testified that she had studied the object for an hour and a half and that

19 *Thome v. Alexander & Louisa Calder Found.*, 70 AD.3d 88 (N.Y. App. Div. 2009). The ruling concerned a stage-set submitted to the Calder Foundation for authentication, about which the Foundation refused to render *any* opinion over a period of approximately ten years.

20 *Kramer v. Pollock-Krasner Foundation, op. cit.*, footnote 10.

21 *Brady v. Lynes et al.*, 2008 WL 2276518 (S.D.N.Y.)

22 *ibid.*

23 *Greenberg Gallery, Inc. v. Bauman*, 817 F. Supp. 167 (D.D.C. 1993), *aff'd without opinion*, 36 F. 3d 127 (D.C. Cir. 1994).

in her opinion the object was authentic, although it had been damaged and repaired. In response to a question in cross examination, she stated that the preeminent authority on Alexander Calder was Klaus Perls.

In an extraordinary display of judicial enthusiasm, the judge waded into the controversy. Criticizing Klaus Perls for his failure to study the object at length and finding compelling the time and intensity with which Ms. Silverman had studied the work, he ruled the object to be authentic.

The appellate division, in a single-line unpublished decision, upheld the lower court, presumably on the basis that the appeals court will not set aside the decision of the trier of fact. So, as with the Atlan work discussed earlier, this left a "work" declared by a court of law to be authentic that no reputable dealer or auction house would touch and no museum or knowledgeable collectors will ever cherish. To this day, the mobile remains unsold and out of view.

"In view of all these decisions, experienced counsel might consider telling disappointed collectors of rejected works that their work will not be converted by a court case into a marketable object . . ."

In view of the testimony that Ms. Silverman had seen hundreds of works by Calder, whereas Mr. Perls had seen thousands, perhaps the judge should have realized that Mr. Perls only needed one-tenth of the time to reach his opinion as did Ms. Silverman to reach hers, or if such a thesis is nonsense, perhaps he failed to recognize why the marketplace would only accept the expertise of Klaus Perls and that the marketplace knew more about authenticity than he. Or perhaps the fault lay with counsel who did not sufficiently instruct the judge (the parties waived a jury trial) on how authenticity is established in the art market, a fact that would be known to any expert appointed by a French court to determine authenticity.

These cases are merely examples of the truth that the power of judicial procedure and the weight of

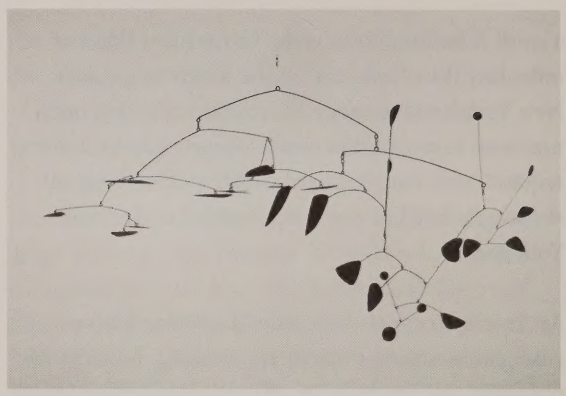

FIGURE 2. ***Rio Nero,*** **a disputed sheet metal and steel mobile, said to by Alexander Calder, which was at issue in a legal case in federal court in Washington.**

court decisions will have no effect on the value that the market will give to works of art, though these lawsuits are powerful proof of the intimidations faced by Authorities and authors of catalogues raisonnés.

In view of all these decisions, experienced counsel might consider telling disappointed collectors of rejected works that their work will not be converted by a court case into a marketable object, and that the possibility of obtaining monetary damages, while always a possibility, is unlikely.

DEFENSES

In the meanwhile, Authorities have been examining how they might better protect themselves from claims. One way is to require an agreement by any party submitting an object for consideration. Well-drafted agreements[24] normally grant to the Authority immunity from suit, the right to publicize any findings, and the right to retain copies of the work and work notes, so that scholarly research can continue in an appropriate manner.

Another method by which a seller may protect himself, particularly with a knowledgeable buyer, is to require in the sales agreement that the parties

24 See "Appraisal Contract" in Ralph Lerner and Judith Bresler, *Art Law* (Practicing Law Institute, 2005), Third Edition, Vol. I, p. 681. Such a contract is sometimes also called a "submission agreement."

recognize the authority of a given person in his determination that the work is authentic.[25] Nevertheless, in a recent case where the complaint, among other charges, alleged "fraud and wrongdoing in connection with the solicitation of the Submission Agreements,"[26] the United States Federal Court for the Southern District of New York, in its efforts to afford a plaintiff every opportunity to have justice, permitted a hearing on this issue rather than dismissing the claim.

The case never went to trial on the merits, however. There was a settlement, with the plaintiff agreeing to withdraw his case. He did not, he said, have the resources to continue. Presumably, the decision was also spurred because his claims under Section One and Two of the Sherman Act, the New York Donnelly Act, and the Lanham Act were denied in part, making a successful conclusion of the litigation more problematic for the plaintiff.

Another protection for an author of a book on an artist's work is to abandon the idea of a catalogue raisonné, where French law, as noted above in the Atlan case, requires that all works of the artist must be presented. The suggestion is that a *catalogue critique*, rather than a catalogue raisonné, would allow an author to make judgments, as an artist would have made, as to what he considered completed work, and what were merely unsuccessful work products or works in such bad condition that they should not be listed as part of his *oeuvre*. Such incomplete, unsuccessful or damaged work product would not need to be included in a *catalogue critique*. The duties of an author or editor of a *catalogue critique* have yet to be litigated in France or in the United States, but the "modesty" affected by the author and editor that their publication is not to be considered exhaustive could well act as a shield against claimants.

Still, the overhang of litigation costs is not in the interest of scholarship and such litigation cannot change the decision made in the marketplace as to the worthlessness of objects rejected by scholars as not being by the hand of a given artist.

• • •

25 "The Parties acknowledge Mr. …'s opinion, which has established the work's authenticity…. Due to the possibility of accessing other opinions as well as impartial technical means, the Parties recognize that they are in a situation of contractual balance in terms of the information at their disposal."
"The parties recognize that, in the case of the present contract, that is, the sale of a work of art such as the work …, the uncertainties induced by the progress of science and research do not permit confirmation of the authenticity with absolute certainty. Therefore, on the matter of authenticity, the parties accept as unique cause of rescission of this contract, any change in Mr. …'s opinion."
Such a provision has not, to the author's knowledge, been tested in any litigation.

26 *Joe Simon-Whelan v. the Andy Warhol Foundation for the Visual Arts, Inc. et al.* (2009 WL 1457177 (S.D.N.Y.)

LETTERS TO THE EDITOR

REMINDER

"Letters to the Editor" are welcome in *IFAR Journal.* Please keep letters brief.

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RESALE ROYALTIES AND THE VISUAL ARTS
SHOULD *DROIT DE SUITE* COME TO THE U.S.?

A PANEL DISCUSSION

EDITOR'S NOTE:

The following article is an edited version of a panel discussion held in December 2010 at New York University's Maison Française and organized by the Artists Rights Society, in cooperation with Museums Project Partnership. Although it is unusual for IFAR Journal to edit and publish the proceedings of a non-IFAR program, the subject of artists' resale royalty rights (droit de suite), albeit controversial and with many opponents, is an important and timely one that merits airing. This is especially true now, as a push to get the U.S. Congress to consider federal legislation in favor of droit de suite is currently underway, led in part by the Artists Right Society, which organized this program. Senator Herbert Kohl, Democrat of Wisconsin, is considering legislation to amend Title 17, USC, §§ 101, 106, 401, and 701(b). It would bear the title: "The Equity for Visual Artists Act."

NB. *As IFAR Journal was at press, we learned that several artists — including the painter Chuck Close — have filed virtually identical Class Action lawsuits in federal court in California against Christie's, Sotheby's and eBay for willfully violating the California Resale Royalties Act, an Act discussed in the following article. The auction houses have said that they will vigorously defend themselves; a spokeswoman for Christie's going as far as calling the law itself "flawed." We look forward to following this story in the Journal.*

INTRODUCTION: MARTIN MULLIN*

Resale royalties, sometimes referred to by the French term *droit de suite,* are royalties payable to an artist or an artist's heirs each time a work is resold. As currently enacted, *droit de suite* applies during the artist's lifetime and for a period of 70 years following the artist's death.[1] *Droit de suite* is in effect today in over 40 countries — in France since 1920,[2] and in the entire European Union since 2006. While it is not in effect nationally in the United States, it has existed in

* Martin Mullin, a partner in Museum Projects Partnership, which helped organize this Artists Rights Society (ARS) panel, served as program moderator. He is also an independent curator and artist.

** Theodore Feder, Ph.D., is Founder and President of Artists Rights Society, which represents the copyright and intellectual property rights interests of numerous artists, and is also the Founder and President of Art Resource, an art historical photo archive.

Frank Stella is an American painter and printmaker. He was elected President of the CIAGP, the International Council of Creators of Graphic, Plastic and Photographic Arts (Conseil International des Créateurs des Arts Graphiques, Plastiques et Photographiques) in November 2010 for a term of two years. In 2009 he received a National Medal of Honor from President Barack Obama.

Christiane Ramonbordes is Executive Director of La Société des Auteurs dans les Arts Graphiques et Plastiques (ADAGP). She is also Chairperson of European Visual Arts (EVA), which represents the interests of 25 European authors' collecting management societies for the visual arts.

1 In England, which introduced *droit de suite* in 2006, the law currently applies only to living artists. In 2012, the country is scheduled to enact the second part of the legislation, applying to the 70 years after the artist's death. In California, see fn 3 below, *droit de suite,* originally applied only for living artists, but now endures for the artist's heirs for a period of 20 years after the artist's death, provided the artist died after January 1, 1983.

2 Loi de 20 mai 1920; superceded in France by Loi de 11 mars 1957 (Copyright Act of 1957).

the state of California since 1977.[3]

Tonight's three panelists** —Theodore Feder, Founder and President of the Artists Rights Society; Frank Stella, noted artist and current president of CIAGP, the umbrella organization for 40 artists rights societies; and Christiane Ramonbordes, Executive Director of the Paris-based French rights organization, ADAGP, the Society of Authors in the Graphic and Plastic Arts, and chairperson of the Brussels-based European Visual Arts Consortium, will shed light on why they believe that resale rights should be introduced in the United States.

THEODORE FEDER

Let me begin by saying that it is about time that the U.S. caught up with Western Europe and adopted the resale royalty, or *droit de suite*, which was initiated by the French 90 years ago

It is important to bear in mind that visual artists are the only members of the creative community in the U.S. who do not receive residual payments for their works. Composers and lyricists will collect some two billion dollars this year in royalties for their compositions, distributed by their rights societies, chiefly ASCAP and BMI. Playwrights and screenwriters get public performance royalties akin to residuals for later productions of their works. Actors in film and TV get residuals in what are called neighboring rights. All of these are revenues garnered by creators after their initial creative output. Alas, visual artists receive none of these and do not earn a penny in residual or resale payments. The benefits derived from the appreciation in their works accrue predominantly to collectors, auction houses, galleries, and, to some degree, museums.

In sum, there has never been a national resale royalty law in the U.S. and, consequently, artists have never benefited from a federally mandated right. One state, however, California, as has been pointed out, has instituted the *droit de suite,* but no matter how well-meaning the California Act, it is relatively easy to circumvent and compliance with it is relatively rare.

3 The California Resale Royalties Act, CAL. CIV. CODE § 986, was signed into law on September 22, 1976 and became effective January 1, 1977.

Under the California Resale Royalty Act, a seller or his agent is obligated to locate the artist and pay a 5% royalty on sales of fine art (defined as an original painting, sculpture, drawing, or work of glass that is not permanently attached to real property), provided the value of the sale is more than $1,000 and exceeds the previous sale price of the same work.

There are two residency requirements as well:

- The seller must be a resident of California or the sale has to take place in California.
- The artist must be either a U.S. citizen or a California resident for at least two years.

Interestingly, if the artist cannot be found after the sale, the seller must deposit the 5% royalty in escrow with the California Arts Council, which holds the sum for seven years. If the artist does not come forward or cannot be located within that time, the money reverts to the Council for use in acquiring fine art pursuant to California's *Art in Public Buildings Program.* So the notion is that young artists or living artists will benefit from these monies, as will the public from the public works that result.

> "This year, we have galvanized a number of artists on behalf of the royalty right, including Frank Stella, Richard Serra, Claes Oldenburg, Chuck Close, and Jasper Johns, and have hired Washington counsel and a lobbying firm to help push a resale royalty bill through Congress."
>
> — *Theodore Feder*

Although there were a couple of futile attempts to introduce Federal resale legislation in Congress in 1978 and 1987, a more serious effort was made by Senator Edward (Ted) Kennedy and Congressman Robert Kastenmeier in the early 1990s, with the result that formal hearings were held by the Copyright Office in 1991 and 1992, under the direction of William Patry, then Assistant Register of the Copyright Office. Kennedy proposed a 7% royalty with an applicable term coterminous with the term of copyright protection. Unfortunately, Patry resigned his position just before he had to draw up the recommendation of the Copyright Office to Congress, and

the duty to draft the Copyright Office recommendations fell to someone who had little experience dealing with the subject, had not met the heads of the European societies, and had precious few notes left to him by Patry, who went on to have a distinguished career as a writer in the field and has more recently gone over to the user side as a Senior Copyright Counsel for Google.

In sum, the report that was presented by the Copyright Office to Congress was ambiguous. It acknowledged "that a resale royalty is a potent incentive for further creation," but recommended that the Congress do nothing at that time, adding that if and when the European Union harmonized its *droit de suite* laws, the U.S. should "take another look at instituting one of its own." As we know, the EU did harmonize the *droit de suite*, but to this date, 18 years later, neither the Congress nor the Copyright Office has seen fit to sponsor such a law on behalf of U.S. artists. The U.S. is one of the few Western industrialized nations to fail to do so.

This year, we have galvanized a number of artists on behalf of the royalty right, including Frank Stella, Richard Serra, Claes Oldenburg, Chuck Close, and Jasper Johns, and have hired Washington counsel and a lobbying firm to help push a resale royalty bill through Congress. Our legislative counsel leading the effort is Bruce Lehman, ex-U.S. Commissioner

ARTISTS ROYALTY RIGHTS – *DROIT DE SUITE* – AT A GLANCE

Droit de suite is a royalty payment due to an artist or an artist's heirs upon the resale of a work of art. The intent is that artists, along with the marketplace, benefit from the increase in value of their works.

Droit de suite was first introduced in France in 1920. Many other European countries followed suit, including:
Belgium 1921
Italy 1942
Norway 1961
Germany 1965

The European Union Directive (2001/84/EC) mandating *droit de suite* came into force in 2001. It required Member States that did not already have *droit de suite* to adopt it by 2006. The United Kingdom chose to adopt it in two installments: Phase I, in 2006, applied only to living artists; phase II, due to go into effect in 2012, will extend the benefit to heirs of those artists still in copyright (70 years after death).

Under the EU, there is a sliding scale of payments to artists or estates/heirs, based on a percentage of the total sale proceeds, with a cap of 12,500 euros per sale.

Resale rights do not exist nationally in the U.S.; however, California enacted a version in 1977 for qualifying works sold in the state or by California residents. It applies to living artists and their heirs for 20 years after the artist's death.

There is much disagreement as to whether resale rights ultimately benefit or hurt artists.[1] Opponents assert that it benefits only a small portion of artists whose works sell on the secondary market for very large amounts, and that the imposition of a federal royalty right in the U.S. would hurt less popular artists, in addition to creating administrative nightmares of enforcement and payment.

As currently proposed in the U.S., the *droit de suite* would only apply to auction sales; it would not apply to private party sales or sales through galleries.

1 There are many detailed studies of the economic impact of *droit de suite*, including: Clare McAndrew and Lorne Dallas-Conte, *Implementing Droit de Suite (artists' resale right) in England*, London: The Arts Council of England, 2002; Victor Ginsburgh, "Resale Rights," in *A Handbook of Cultural Economics*, chapter 55, pp. 394-399; Victor Ginsburgh, "Droit de Suite. An Economic Viewpoint," in *The Modern and Contemporary Art Market*, Maastricht: The European Fine Art Foundation, 2005; and R. Filer, "A Theoretical Analysis of the Economic Impact of Artists' Resale Royalties Legislation," *Journal of Cultural Economics*, vol. 8, 1984, pp. 1-28.

"... While pushing for [*droit de suite*] on the federal level, it might be worthwhile to make a serious push on the state level in New York."
— *Frank Stella*

of the Patents and Trademarks Office in the Clinton administration and former Acting Chairman of the National Endowment for the Humanities, among other distinguished accomplishments. He is well known in the halls of Congress, where it will be necessary to get the bill approved.

• • •

FRANK STELLA

There is not much for me to add, other than to say that being in favor of the resale royalty right seems to me obvious. As an artist, I have actually collected money twice from the California resale right. Harry "Hunk" Anderson, a wonderful man and a major California collector, gave and sold a painting of mine and a resale right was due to me. He felt that he still had to "blackmail" me, that for the amount of the resale royalty, I should give a painting in his honor to the San Francisco Museum of Modern Art. And so SFMOMA has a painting as a gift from Hunk Anderson that they don't really like. Nonetheless, that is how it worked out.

I also received a royalty from the collector Norton Simon when he de-accessioned a painting of mine in the course of re-organizing the Pasadena museum in favor of art that he liked.[4] Those are my only experiences with resale royalties.

I realize that it is difficult to enact *droit de suite* on a national scale, but, while still pushing for it on the federal level, it might be worthwhile to make a serious push on the state level in New York. Even if the federal effort were to be ongoing, it would not happen right away, and there is a chance that we might accomplish in New York something similar to what was accomplished in California. To my way of thinking, it would make a big difference to have both a New York and California resale right, and it would lay the groundwork towards a federal push. We might find sympathy in Albany with our new governor, Andrew Cuomo, and we should make that effort.

• • •

CHRISTIANE RAMONBORDES

It is a big help to have a great artist like Frank Stella, President of CIAGP, support this project in the United States. *Droit de suite* is important. Not only is it fair that an artist benefit from the increase in value of his works, but it is one of the only rights that the visual artist has. Musicians and writers have reproduction rights. Moreover, when an artist has sold a painting or sculpture or whatever, he loses trace of it, and *droit de suite* provides a thread between the artist and the work, allowing him to follow what is happening with his work. Of course, artists are happy to receive money from the *droit de suite*, but it is also very important for them to know that their work has been sold, whether in Germany, or Italy, because that continues the life of the work.

"There are limitations in Europe on the *droit de suite* as it applies to galleries, because, when the EU Directive was introduced, the galleries threatened to boycott works by artists subjected to the payment."
— *Christiane Ramonbordes*

Although American artists cannot generally benefit from *droit de suite* in Europe (because there is no reciprocal benefit in America), there is an exception in France: if the American artist or an artist of another nationality has lived in France for at least five years (not necessarily consecutive years), that artist can benefit from *droit de suite*. But, of course, American artists should have *droit de suite* here in the United States, which is what we are fighting for.

The fear expressed in the United Kingdom of de-localization of sales due to the *droit de suite* – that is, loss of sales and a market shift to the United States

4 In 1974, the Pasadena Museum of Modern Art (previously the Pasadena Art Museum) closed, and reopened in 1975 as the Norton Simon Museum of Art in Pasadena, incorporating the private collection of Norton Simon.

– is actually a false argument, since the British put the burden of paying the *droit de suite* on the buyer, not the seller, as it should be under the EU Directive, and it is the seller who determines where to market the work. Nonetheless, if the United States adopts the *droit de suite*, this will not be an issue.

Droit de suite is a very strong artist right and is one of the only rights that is inalienable, meaning that the artist cannot renounce it even if he provides the auction house with a signed document to that effect. Such a document would have no value in any country where *droit de suite* exists. The Berne Convention — an international agreement governing copyright laws, which recognizes *droit de suite* although it does not make it compulsory, otherwise the United States would not have become a signatory in 1987 — did recognize the inalienability of the *droit de suite* and also states that artists of a country that recognizes *droit de suite* can receive the benefit in the other countries that apply *droit de suite*.

"Last year, in France, we collected 5,500,000 euros, which represents a very small amount of the 3 billion euro art market, and more than 2,000 artists benefited." — *Christiane Ramonbordes*

There are limitations in Europe on the *droit de suite* as it applies to galleries, because, when the EU Directive was introduced, the galleries threatened to boycott works by artists subjected to the payment. So they succeeded in getting a limited amount of time to resell a work. If a gallery resells a work within three years or at a price below 10,000 euros, it is exempt from paying the *droit de suite*. Europe also permits compulsory collective management, which, if it is an artists' society like ours managing it, really strengthens the *droit de suite*. Why? Because it is difficult for an artist alone to know when his works are sold.

In Europe, there is a sliding scale of payments — a decreasing percentage according to the price of the works — due to fear, raised by the British, of the de-localization of the market to the United States. I hope that when *droit de suite* is passed here that will end, because the amounts were higher in Europe before the introduction of the Directive. For example in France, the *droit de suite* was 3% without any limitation; in Germany, it was 5%. The artists have lost.

The Directive set 3,000 euros as the minimum sales price above which the *droit de suite* applies, but allowed every country to adjust it down if desired. In France we have a minimum sales price of 750 euros, and many other countries have less than 3,000 euros. Artists whose works sell for less than 3,000 euros should also benefit. Last year, in France, we collected 5,500,000 euros, which represents a very small amount of the 3 billion euro art market, and more than 2,000 artists benefited. So it is false when detractors say that *droit de suite* benefits only two or three families. Last year the largest *droit de suite* sums that ADAGP collected in France were for two lesser known living artists, one of whom was Pierre Soulages. They are not very young, but they are alive.

Nor is it true that all artists' families are rich. Many families of very important painters have not inherited works; the artists sold all their works during their lifetime in order for their families to survive. When the EU Directive was introduced, we asked for testimony from some of our members. Here are two statements from artists' widows. One, Françoise de Stael, the widow of Nicolas de Stael, wrote: "In his lifetime, my husband hardly had enough to live decently. It was only in 1953, two years before his death, that things got better for me and my children. During all these years, *droit de suite* allowed me to defend his work, publish his catalogue raisonné, and pay lawyers' fees in actions concerning fakes . . . I find it most unfair to even think of taking away from beneficiaries the modest participation represented by *droit de suite* or that merchants and collectors [alone] could benefit from the important profit of the market."

Another widow wrote: "In the 1920s, my husband was living in an insalubrious building on Rue St. Martin with his wife and a newborn baby. After a first exhibition in Paris in 1947 of his most recent work, an exhibition that met with indifference and hostility, he lived for 15 years in utter solitude, excluded from all artistic groups and from galleries, exhibitions and museums. And now his work sells for millions of euros."

With these two examples of beneficiaries of the *droit de suite*, I will end my presentation.

• • • continued »

Q & A

Q Given European privacy regulations, how do you record and track sales for *droit de suite*?

A CHRISTIANE RAMONBORDES (CR): With auction sales it's very easy because everything is public. Sotheby's and Christie's, for example, even in the United States, publish all the results. With galleries, it's a little bit more opaque. That is a problem everywhere.

Germany has another system, which mixes the collecting of *droit de suite* with social security. The society in charge of collecting *droit de suite* collects a percentage on the galleries' income. That is, a percentage of the total revenues of the galleries is collected to cover either *droit de suite* or social security, and this accrues to the artist.

Q Frank, have you sold in Europe and not been able to collect?

A FRANK STELLA (FS): Yes, my paintings have been re-sold in Europe, but we never even gave it a thought. *Droit de suite* is not something that we are able to pursue there or that anyone wants to pursue. The only thing that I would make a comment about is the resistance to *droit de suite* by the people in the business community. Nonetheless, the artists are bound with the sellers and the collectors, be they the auction house or the galleries or individual private collectors. The problem is that everybody sees the resale right as a disadvantage. But the resale right is what it is. The real problem is accepting a responsibility to the artist and the work that is created. With the Artists Rights Society, the *image* is becoming more important. The resale right is about physical objects and the selling of them. But eventually, not in my lifetime, but for the artists in the future, the diffusion of the images is going to be a much bigger thing. It probably will never get to the level of what happens in music, but you don't really know. There are a lot of possibilities with using images, and the real issue for the artist is, how individual are the images? An artist can make an image, but within seconds somebody can modify the image. Years ago, the television program "Laugh-In" featured a huge Protractor painting of mine in the "background," or rather, their version of a Protractor painting. When we wrote them a delicate little letter saying, "that was interesting, that Frank Stella in the background," they said: "Oh, no, that was a work done by our graphic department and inspired by the work of Frank Stella."

They were — are — very conscious of the images, and the fact is they would have paid for it. They were only nervous that we caught them. But if the system had been in place, they would have paid, and a lot of the movies pay now for use of paintings or reproductions of paintings. So the people that are used to paying royalties for music and writers and other things will accept paying for the artists. The only ones who are really resistant to it are the people who are directly involved in it. The ones who should be the most involved are reluctant.

> "The problem is that everybody sees the resale right as a disadvantage. But the resale right is what it is. The real problem is accepting a responsibility to the artist and the work that is created."
>
> — *Frank Stella*

Let me add that many images are now available for reproduction mathematically. They can be reproduced exactly because the artist has had them scanned, either in the two or three dimensions. I don't know actually how that will play out.

Q Would Ted Feder speak to the use of images and how they might supersede the actual object?

A THEODORE FEDER (TF): Artists Rights Society does monitor reproductions of an artist's work. In the old days, this meant looking at books. We *still* look at books, and we look at the Internet as

THEODORE FEDER = TF
MARTIN MULLIN = MM
CHRISTIANE RAMONBORDES = CR
FRANK STELLA = FS

well. It is very difficult to police the Internet; there are hundreds, if not more, sites showing the works of our members. We go after the commercial sites first, the ones that are most likely to have a detrimental effect on the market and integrity of the work. As we know, the copyright law states that the artist has exclusive rights to exploit his or her own work. There are people who will maintain that they've been inspired, let's say, by Frank's work, and have appropriated it without his permission. Additionally, there are many unauthorized reproductions. We go after the most commercial and egregious uses first, leaving many of the scholarly sites alone. I would guess that we spend 30-40% of our time trying to take down or remove illicit uses from the marketplace.

Q Now that there is a Democratic administration in California, have you been lobbying to beef up the *droit de suite* there, because, although it's basically a good law, it could be a lot better.

A TF: This is a very interesting question. One would assume that the Democratic party being liberal is more open and receptive to artists rights, but the fact is there is a movement in the States that is called the "copyleft" movement, which comes out of the liberal side of the ledger and holds that all copyrights should be free and works could be used by anybody. This is very antithetical to the interests of artists. I regret to say that the head of the "copyleft" movement, Lawrence Lessig, was a technical advisor to President Obama when he was running for the presidency. Lessig and his allies certainly favor a diminution in the protections afforded by copyright, while also proclaiming the virtues of appropriation, sampling and copying.

FS: Unfortunately, other artists can reproduce my work – copy it exactly – and stick it into their work and call it their work.

Q I have a practical question. Who would administer *droit de suite* if it were passed in the United States? I assume it would be organizations like Artists Right Society. How many of them are there in the United States, and how do you function?

A TF: There are two societies, ours and a much smaller one called VAGA. Following the model that exists in Europe and elsewhere, the artists rights societies would be the ones administering it. We would establish some methodology of cooperation with the copyright office in so doing.

Q Mr. Feder, does your organization define fine art for the purposes of your lobbying efforts? The example that comes to mind would be animation as sold in a gallery. Some might view that as fine art.

A TF: The California Resale Royalty Act actually defines what a work of fine art is, and that includes paintings, sculptures, drawings, and original work of art in glass.

Q For the artist resale royalty, have you thought about suggesting a tax credit or deduction, a business expense, for those people required to pay the royalty, something that will overcome some of the resistance you're getting from people saying that the royalty is unfair and will cost them money.

A TF: That is a great idea. Our legislation, as drawn by Bruce Lehman, does not take that into account. I don't know if there is a methodology for accomplishing that, but I will certainly mention it to him in the hope that it might be incorporated.

Q Why do people say it's only the rich artists who would benefit from a *droit de suite*?

A CR: It is the detractors of *droit de suite* who say that. The people who don't want to pay say that it benefits only rich artists, which is not true. As I said before, 2,000 artists last year were paid from ADAGP. So of the 2,000, of course there are a number of artists whose works sell at higher prices. But there are also hundreds and hundreds of artists whose works sell at very modest prices.

Q Is the royalty percentage based on the profit or on a percentage of the total sale, and if it's the latter, what about a work that is resold a lot? Is there a limit on that potential?

A TF: You get the resale each time. It's perfectly fair. Of course, it means that the work is being resold multiple times.

Q But is it based on the full value of the sale or just the difference between that and the last price?

A TF: No, the full value. In California the price has to be greater than the previous sale price, but the general rule is that the royalty is based on the full value.

Q So, just for argument's sake, a million dollar work that is resold at two million and three years later at four million, the artist or family is getting 5% of the one million, the two million, and the four million?

TF: Right. Do you find that unacceptable?

QUESTIONER: I find it uneven. Obviously, for a work that is sold a lot, they're not making the royalty just on the difference, they're making it on the whole amount.

TF: Regardless, the seller has benefited a great deal by obtaining a willing buyer.

QUESTIONER: Maybe not. There are taxes, capital gains, every time you sell.

Q You mentioned that if the artist lived in France for a certain amount of time and went to the U.S., he could still apply to the French for the *droit de suite*.

A CR: Yes. Usually it's the nationality of the artist that determines *droit de suite*, so an American artist is not supposed to benefit in France. But if he lived in France for five years, he's assimilated into the French repertory and is treated like a French artist. He has to prove that he lived in France for the requisite period, of course. Alexander Calder, for example.

Q You mentioned that people are resisting resale royalties and wonder why families of artists would need the funds, but managing an estate of a deceased artist is difficult, and making a catalogue raisonné

> "[Private sales] are excluded, and they would be excluded from our bill."
>
> — *Theodore Feder*

is a lifetime job, especially for a prolific artist. Who more lovingly would take care of that than the estate or the family of the artist? It is so much work.

A TF: As it happens we have two descendants of very distinguished artists in the audience—an heir of Henri Matisse and an heir of Marc Chagall. They could speak to this. I know that neither of them is swimming in money, and they've got work they must do on behalf of the artist's estate.

Q How would *droit de suite* work with private sales? I understand the problem with galleries, but it seems to me the real difficulty is with private sales.

A TF: They're excluded, and they would be excluded from our bill.

Q Are private sales excluded in Europe as well?

A CR: Yes. Because it's impossible to control.

FS: Oh, excuse me. Regarding private sales, if Steve Wynn sells a painting to Eli Broad, they make whatever deal they want. But it's really a problem for the IRS, counting the value of the stock and the amount of cash that's turned over. So it's an accounting problem. But, nonetheless, they have to account for it, and if they have to account for it to the government, I see no reason why they shouldn't have to account for it to the artists and their estates.

Q Do most people know that private sales are excluded because I would think that that's where a lot of the resistance is?

A TF: There is great resistance among dealers to whom the law would not apply. We could certainly emphasize this.

MM: That's a good point. And perhaps a good place to end the discussion of *droit de suite*.

• • •

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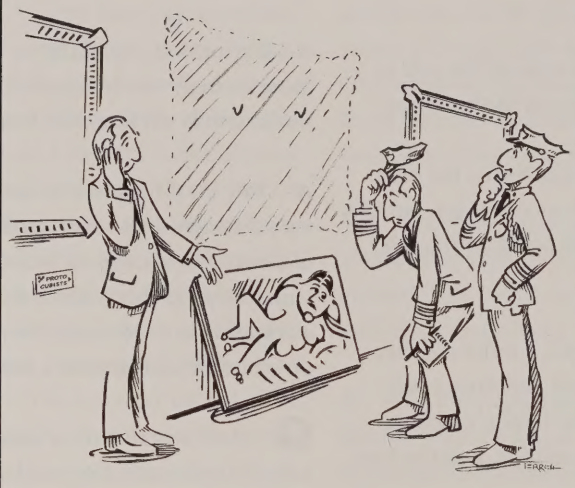

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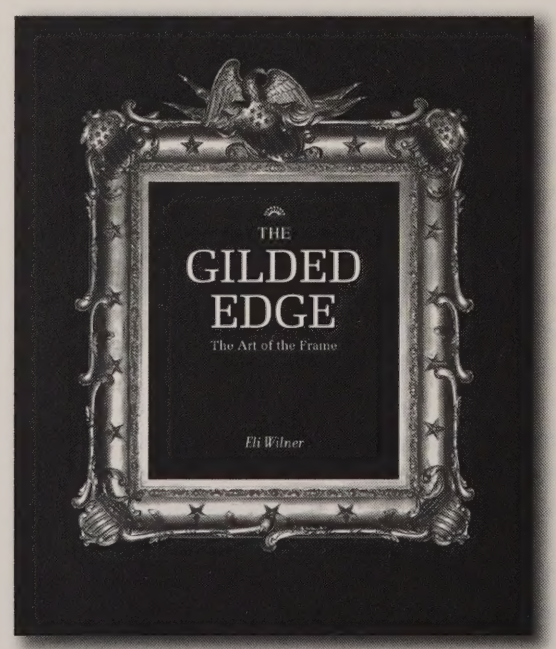

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The photo of each item is accompanied by a brief description of the work, the ALR catalogue number, if registered, and the date and place of theft. An asterisk before the catalogue number means that a photograph of the stolen work is available, although not necessarily included in this issue.

Anyone wishing additional information should contact the ALR at 44.207.841.5780. From the U.S., add the prefix 011.

STOLEN ART ALERT

STOLEN ART*

PAINTINGS

197. ROGER (SYD) BARRETT (English, 1946-2006). ***Self Portrait,*** c. 1961-62. Oil on board. 30.99 x 23.01 cm (approx. 12" x 9"). W: 23.01 cm (approx. 9"). *L11.205. Stolen from a gallery in London, England on April 9, 2011.

198. DUKE COLLINS (American, contemporary). ***Sitting Nude.*** *L11.398. Stolen from a gallery in Redwood City, CA on June 10, 2011.

199. PHILIP CRAIG (Canadian, born 1951). ***Standing at Water's Edge.*** Oil on canvas. 30" x 36" (76.2 x 91.44 cm). Signed l/r. *L11.363. Stolen from a private residence in Toronto, Ont., Canada on December 4, 2010.

200. JOAN GILCHRIST (New Zealander, 1918-2008). ***Untitled.*** Oil on card. 18" x 13" (45.72 x 33.02 cm). Artist's monogram "JG" at l/r. *L11.272. One of three paintings by the artist stolen from a gallery in Oxfordshire, England on April 21, 2011.

201. BRYAN IDA (American, born 1963). ***Untitled,*** 2010. Oil and epoxy on panel. 24" x 24" (60.96 x 60.96 cm). Signed and dated verso. *L11.336. One of four paintings stolen from the artist's place of business in Los Angeles, CA on January 12, 2011.

202. KOMAR and MELAMID (Russian/American, born, respectively, 1943 and 1945). ***Yalta 1945,*** c.1986-87. Oil on canvas or board. 36" x 36" (91.44 x 91.44 cm). *L11.233. Part of a major installation by the artists. Stolen from a storage facility in New York on October 10, 1996.

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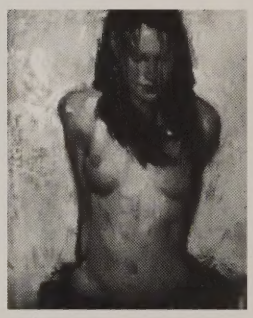

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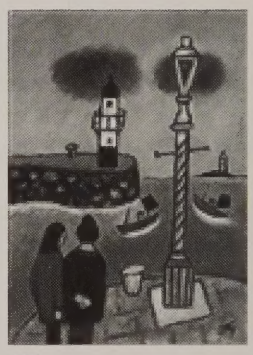

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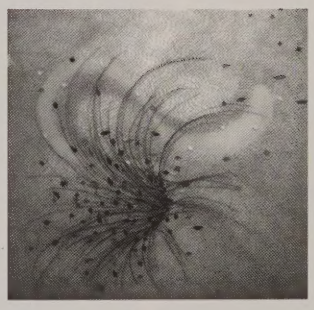

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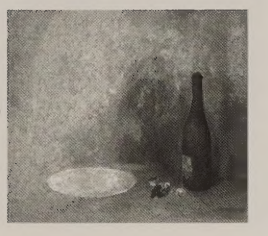

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203. ROY LICHTENSTEIN (American, 1923-1997). ***Sunrise,*** 1965. See color photo on inside back cover.

204. LEV MESHBERG (Russian/American, 1933-2007). ***Still Life with Bottle,*** 1968. Oil on panel. 70.99 x 81 cm (approx. 28" x 32"). *L11.342. One of six paintings stolen from a private residence in Tarzana, CA on May 25, 2011.

205. SNAFFLES (CHARLES JOHNSON PAYNE) (English, 1884-1967). ***The 'osses loves the 'ounds but I loves both,*** c.1930-1940. Ink and watercolor on paper with a handwritten caption. 8" x 10" (20.32 x 25.4 cm). *L.11.238. Stolen from a stall at the Badminton Horse Trials, South Gloucestershire, England, on April 22, 2011.

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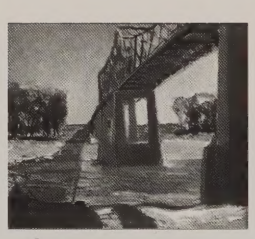
*The following two paintings were stolen from a college in London, England on April 13, 1981. *L11.191:*

206. JAMES WARD (English, 1769-1859). ***The Bay Hunter.*** Oil on panel. 69.9 x 91.49 cm (27 ½" x 36").

207. JAN WIJNANTS (attrib. to) (Dutch, 1635-1684). ***Landscape,*** c. 1650. Oil on canvas. 78.79 x 60.91 cm (approx. 31" x 24"). Possible inscription verso: "DPF633" or "DPG."

STOLEN ART ALERT

The following two paintings by AUGUSTUS WILLIAM DUNBIER *(American, 1888-1977) were stolen from a gallery in Chicago, IL:*



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208. ***South Omaha Bridge.*** Oil on masonite. 24" x 28" (60.96 x 71.12 cm). Signed l/l. *L11.245. November 30, 2006.

209. ***A Winter's Afternoon.*** Oil on canvas. 24" x 28" (60.96 x 71.12 cm). Signed l/l. *L11.315. February 29, 2008.

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210. THORVALD SANCHEZ, JR. (Cuban/American, contemporary). ***Abstract.*** Oil on canvas. 51" x 27 ½" (129.54 x 69.85 cm). *L11.170. Stolen from a private residence in New York on September 22, 2010. See also items 247-250; 261 below.

210

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*The following two paintings were stolen from a private business in New York on June 14, 2011. *L11.399:*

211. FRANCESCO GUARDI, after (Italian, 1712-1793). ***Study of Boats.*** See color photo on inside back cover.

212. GEORGE LUKS (American, 1866-1933). ***Young Girl,*** ca. 1927-28. Oil on cardboard. 9 ½" x 13" (49.53 x 33.02 cm). In a pencil inscription verso, the original owner states that the work was given to him by the artist, George Luks, E. Chatham NY.

212

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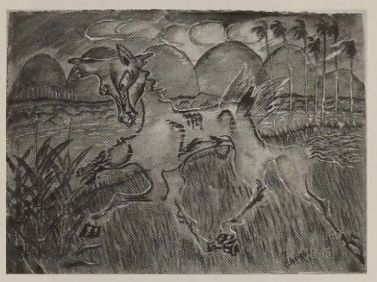
214 RECOVERED



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*The following two paintings stolen from a museum in Leerdam, The Netherlands on May 27, 2011. (*L11.325) were recovered on October 28, 2011:*

213. FRANS HALS (Dutch, 1581-1666). *Laughing Boy with a Pitcher of Beer.* See color photo on inside back cover.

214. JACOB ISAACSZ. VAN RUYSDAEL (Dutch, 1628-1682). *Forest Landscape with Blooming Flowers/ Elderberry.* Oil on panel. 32.99 x 29.5 cm (approx. 13" x 11 ¼").

216

The following 3 paintings by CARLOS ENRIQUEZ *(Cuban, 1900-1957) were stolen from a private residence in Santa Clara, Cuba sometime in 2006 or 2007. *L11.387:*

215. ***Untitled (Horses).*** Watercolor on cardboard. 16" x 20" (40.64 x 50.8 cm). Signed and dated l/r.

216. ***Untitled (The Rape of the Guajira),*** c. 1955. Watercolor on cardboard. 18" x 24" (45.72 x 60.96 cm). Signed l/r.

217. ***Untitled,*** c. 1955. Watercolor on cardboard. 3 ¼" x 3 ¼" (8 x 8 cm).

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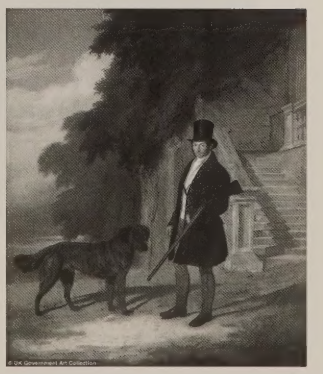

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*The following three paintings were stolen from the British Ambassador's residence in Tripoli, Libya during civil unrest on May 1, 2011. *L11.400:*

218. EDMUND HAVELL, JR. (English, 1819-1894). ***Portrait of William Stratton, Head Keeper to Sir John Cope of Bramshill Park, Hampshire,*** 1840. Oil on canvas. 186 x 156.01 cm (approx. 78 ¼" x 61 ½").

219. PHILIP REINAGLE (English, 1749-1833). ***Harrier Killing a Bittern,*** 1797. See color photo on inside back cover.

STOLEN ART ALERT

220. SALVATOR ROSA, after (Italian, 1615-1673). ***Mountainous Landscape with Travellers.*** Oil on canvas. 208 x 138.5 cm (82" x 54 ½").

The following paintings were stolen from a private residence in Virginia City, MN on April 15, 2011. *L11.239. See also item 262:

221. CHARLES BEAR (American, born 1950). ***Raven's Top Knot – Blackfeet,*** c. 1920. Oil on board. 22" x 24" (55.88 x 60.96 cm). Signed u/r.

222. TOM SAUBERT (American, born 1951). ***Cool Water.*** Oil on board. 8" x 10" (20.32 x 25.4 cm).

The following four paintings by RHODA ROSS *(American, contemporary) were stolen from the artist's studios in New York City and Hillsboro, New Hampshire in two separate burglaries that occurred in 2007-2009. See also items 251-254:*

Stolen in New York (*N09.430):

223. ***9 West 57th Street II,*** 2007. Oil on canvas. 36" x 24".

Stolen in New Hampshire (*N09.447):

224. ***Elegy for Kennedy,*** 2008. Oil on canvas. 104" x 60".

225. ***New Haven Rooftops,*** 2008. Oil on canvas. 30" x 36".

226. ***Rose Mallow,*** 2008. Oil on canvas. 17" x 26".

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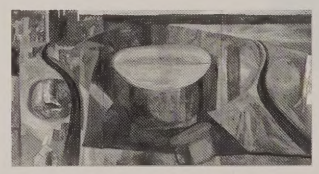

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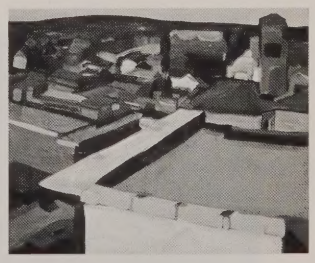

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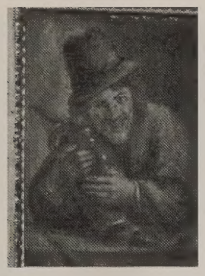

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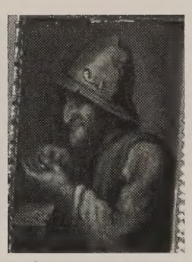

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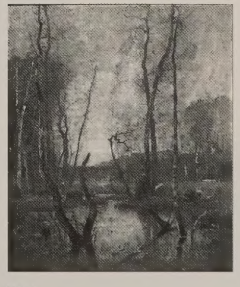

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The following paintings (UNKNOWN *artist) were stolen from a private residence in Rekawinkel, Austria on January 3, 2011. *L11.275:*

227. ***Counterparts – Farmers*** (20th century). 24.99 x 19.99 cm (approx. 9 ¾" x 7 ¾").

228. ***Counterparts – Farmers*** (20th century). 24.99 x 19.99 cm (approx. 9 ¾" x 7 ¾").

229. ***Grandfather's Birthday*** (19th century). 40.01 x 35 cm (15 ¾" x 13 ¾").

230. ***Landscape*** (19th century). 40.01 x 54.99 cm (approx. 15 ¾" x 21 ½").

231. ***Woman in a White Collar.*** 30 x 24.99 cm (approx. 11 ¾" x 9 ¾").

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*The following paintings were stolen from the Villa Saint Basil in Pau, France, on May 17, 2011. *L11.07:*

232. EUGÈNE CLAUDE (French, 1841-1922). ***Fruit Bowl with Peaches.*** Oil on canvas. 59 x 73 cm (approx. 23:" x 28 ¾"). Inscribed verso: 897.5.4 PAU.

233. GASTON HOCHARD (French, 1863-1913). ***Sur la terrasse de bagatelle,*** 1908. Oil on canvas. 64.01 x 80.01 cm (approx. 25" x 31 ½"). Signed u/l. Inscribed verso: 09.3.1 PAU.

234. LOUIS AIMÉ JAPY (French, 1840-1916). ***Avril dan les bois de Pierrefonds,*** 1887. Oil on canvas. 54.99 x 46 cm (approx. 21 ¾" x 18 ¼"). Signed l/r. Inscribed verso: 897.5.11 PAU.

STOLEN ART ALERT

235. ALBERT TIBULE FURCY DE LAVAULT (French, 1847-1915). ***Grenades and Chrysanthemums,*** 1880. Oil on canvas. Signed/dated u/l. Inscribed verso: 881.1.5 PAU. 65.99 x 100.99 cm (approx. 26" x 39 ¾").

235

236. NICOLA MARIA RECCO (Italian, 18th century). ***Still Life with Crustaceans.*** Oil on canvas. 68.99 x 91.01 cm (approx. 27 ¼" x 35 ¾"). Inscribed verso: 23.7.1 PAU.

236

237. JULIEN VALETTE. ***Villa Entry Capbreton,*** 1880. Oil on canvas. 23.01 x 30.99 cm (approx. 9" x 12"). Signed/dated l/r. Inscribed verso: 31.1.9 PAU

237

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*The following paintings were stolen from a gallery in Toronto, Ontario, Canada on July 11, 2011. *L11.538. See also items 255-258:*

238. ALFRED J. CASSON (Canadian, 1898-1992). ***Hill Top, Charlotte Lake,*** 1950. Oil. 15" x 12" (38.1 x 30.28 cm).

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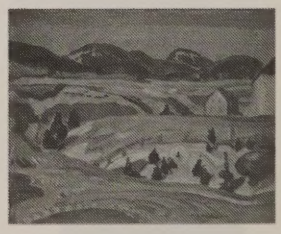
239. ALEXANDER Y. JACKSON (Canadian, 1882-1974). ***Les Eboulements.*** Oil. 10 ½" x 8 1/2" 26.7 x 21.6 cm).



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240. FRANK H. JOHNSTON (Canadian, 1888-1949). ***First Snow, Georgian Bay.*** Oil. 7 ½" x 5 ½" (19.1 x 14.0 cm).

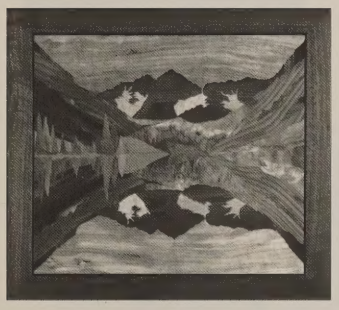
240

241. JAMES E. H. MACDONALD (English/Canadian, 1873-1932). ***Gull River,*** 1918. Oil. 10 ½" x 8 ½" (26.7 x 21.6 cm).

241

242. MARC-AURÈLE SUZOR-COTÉ (Canadian, 1869-1937). ***The Small Hill.*** Oil. 8" x 10 ½" (20.3 x 26.7 cm).

242



243

244

MIXED MEDIA

243. DOUGLAS GREEN (American, contemporary). ***Maroon Bells in Autumn #2.*** Marquetry. Wood veneer pieces. *L11.397. Stolen in Boulder, CO on April 1, 2011.

244. DAMIEN HIRST (English, born 1965). ***Poupée Frimousse de créateurs,*** 2010. Painted fabric. White cotton with multicolor polka dots. H: 35.99 cm (approx. 14 ¼"); W: 24.99 cm (approx. 9 ¾"); D: 5 cm (approx. 2"). *L11.271. Stolen from a Paris auction house on December 7, 2010.

246

247

248

WORKS ON PAPER

245. FRANZ KLINE (American, 1910-1962). ***Study for "Turbin",*** 1958. See color photo on inside back cover.

246. ISADORA MACHADO-LECUONA (American, contemporary). ***Tiffany Window Drawing,*** 2010. Ink and color pencil. 12" x 9" (30.48 x 22.86 cm). *L11.283. Stolen from the public library in New Canaan, CT on April 7, 2011.

The following four charcoal drawings by ELIAS FRIEDENSOHN *(American, 1924-1991) were stolen from a private residence in New York on September 22, 2010. *L11.170. See also items 210; 261.*

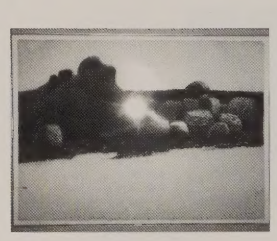
247. *Deer Isle.* 22" x 27 ½" (55.88 x 69.85 cm).

248. *Ferry Beach, Low Water.* 22" x 27 ½".

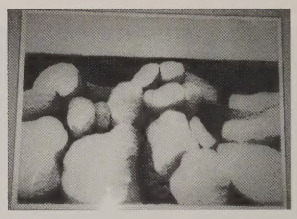
STOLEN ART ALERT

249. *Jetty Rocks.* 22" x 27 ½".

250. *Rocks and Seaweed.* 22" x 27 ½".



249



250

The following four works on paper by RHODA ROSS *(American, contemporary) were stolen from the artist's studio in New York City during 2007. See also items 250 and 251 above:*

251. ***Sentinel,*** 2007. Tousche and acrylic on Fabriano paper.

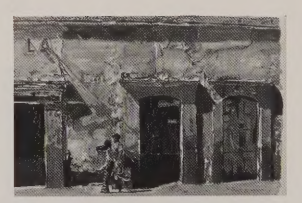
252. ***Itzhak Recording I,*** 2007. Oil on sized Fabriano paper.

253. ***La Calle,*** 2007. Oil on Fabriano paper. 22" x 30".

254. ***Nighttime Chrysler II,*** 2007. Oil on Fabriano paper. 30" x 22".

251

252



253

254

The following works on paper were stolen from a gallery in Toronto, Ontario, Canada on July 11, 2011. *L11.538. See also items 238-242 above:

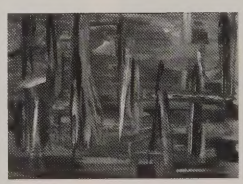
255. PIERRE GAUVREAU (Canadian, 1922-2011). ***Untitled,*** 1946. Gouache. 11 ¼" x 8 ½" (28.58 x 21.6 cm).

256. FERNAND LEDUC (Canadian, born 1916). ***Untitled,*** 1950. Gouache. 13 ½" x 10" (34.29 x 25.4 cm).

257. JEAN PAUL LEMIEUX (Canadian, 1904-1990). ***Jeune Fille, Triste.*** Oil. 16" x 20" (40.64 x 50.8 cm).

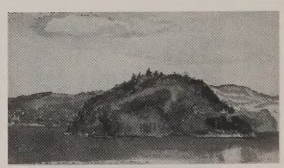
258. FREDERICK J. VARLEY (English/Canadian, 1881-1969). ***Gatineau Hills.*** Watercolor. 11 ¼" x 7 ½" (28.58 x 19.1 cm).

255



256

257



258

STOLEN ART ALERT

PRINTS, LITHOS

The following two lithographs by GRIGORY GLUCKMANN *(Russian, 1898-1959) were stolen from a private residence in Sun Valley, CA on March 12, 2011. *L11.335:*

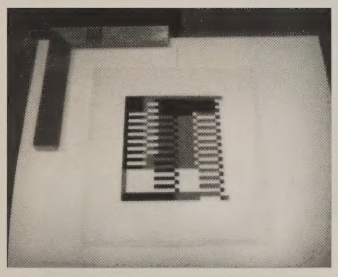
259

260

259. *Berlin 1922 – no. 2.* 24" x 20" (60.96 x 50.8 cm). Signed l/r.

260. *Berlin 1922 – no. 3.* 24" x 20" (60.96 x 50.8 cm). Signed l/r.

261. JOSEF ALBERS (German/American, 1888-1976). ***Pillars,*** 1970. Litho on Arches paper. 24" x 24" (60.96 x 60.96 cm). Ed. no. 88/100. Signed l/r. Numbered l/l. *L11.170. Stolen from a private residence in New York on September 22, 2010. See items 210; 247-250.



261

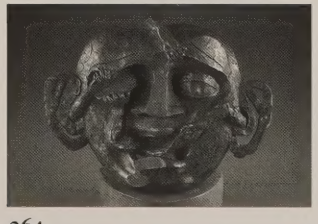
262

SCULPTURE

262. TRUDI GILLIAM (American, contemporary). ***Three Buffalo,*** 2001. Copper and metal with patina. Each buffalo measures 3" x 4" (7.62 x 10.16 cm). *L11.239. Stolen from a private residence in Virginia City, MN on April 15, 2011. See items 221 and 222 above.

263

263. BRYAN KNEALE (Manzx, born 1930). ***Pisces,*** 2010. Bronze with green patina. H: 16.99 cm (approx. 6 ¾"). W: 21.01 cm (approx. 8 ¼"). *L11.279. Stolen from a gallery in London, England on May 10, 2011.

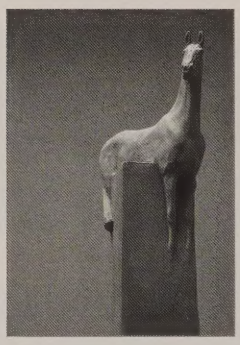


264

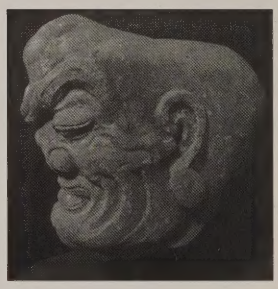
264. LEON UNDERWOOD (English, 1890-1975). ***The Liar,*** 1953. Bronze. H: 23.01 cm (approx. 9"). Signed "Leon U." *L11.200. Stolen from a gallery in London, England on April 7, 2011.

STOLEN ART ALERT

265. UNKNOWN. *Horse Obelisk,* 2010. Green terracotta. H: 30 cm (approx. 11 ¾"). W: 16 cm (approx. 6 ¼"). *L11.220. Lost in transit between London, England and Italy on March 1, 2011.



265



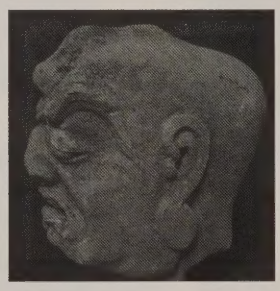
266

CHINESE ANTIQUITIES

*The two sculptures at right were stolen from a private collection in Westport, CT on August 16, 2011. *L11.724:*

266. *Louhan Head* (1) (Chinese, Tang dynasty). Sandstone. 15" x 15" (38.1 x 38.1 cm). Approx weight: 55-70 lbs.

267. *Louhan Head* (2). Same description as above.



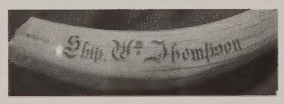
267

DECORATIVE ARTS

IVORY

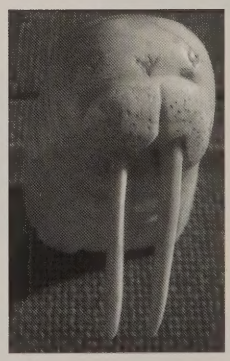
*The following two ivory carvings were stolen from the Cape Cod National Seashore Museum in Eastham, MA on April 18, 2011. *L11.345:*

268. *Ship Wm. Thompson Tusk. Scrimshaw.* Inscribed in black lettering with brown markings. 55.24 x 6.98 x 4.32 cm approx. 21 ¾" x 2 ¾" x 1 ¾").



268

269. *Walrus Head* (Inuit, 19th century). 8 x 5.4 x 7.3 cm (approx. 3" x 2" x 2 ¾".



269

STOLEN ART ALERT

RECOVERED ART*

PAINTINGS

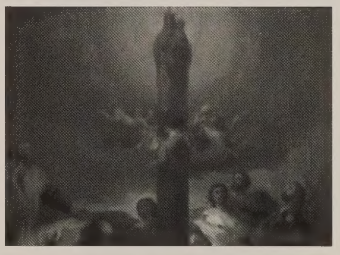
63

63. FERNAND LÉGER (French, 1881-1955). ***Composition aux element mécaniques,*** 1917. Ink on linen cavas. 25 x 20 cm (10" x 8"). Stolen from the Carlyle Hotel in New York City on July 29, 2011. Found July 14 in the Hoboken, NJ apartment of the alleged thief. (The painting illustrated is a later 1924 work from a series of the same title.)

The following two paintings, stolen more than 10 years ago, were recovered in Alicante, Spain on April 13, 1981. #L11.191:

64

64. FRANCISCO DE GOYA (Spanish, 1746-1828). ***The Annunciation,*** 1570. Oil on canvas. 107 x 97 cm (42" x 38 ½").



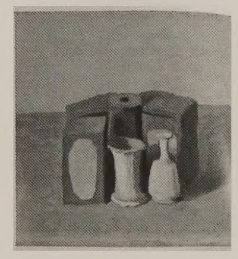
65

65. EL GRECO (Spanish, 1541-1614). ***The Appearance of the Virgin of Pilar,*** c. 1775-80. Oil on canvas. 120 x 98 cm (47 ¼" x 36").

The following paintings by GIORGIO MORANDI *(Italian, 1890-1964) were stolen in Monaco and recovered by the Carabinieri in Monza, Italy on June 3, 2011. *L11.7. See also items 72-74:*

66

66. ***Still Life,*** 1963. Oil on canvas. 24.99 x 30 cm (approx. 10" x 11 ¾"). Signed l/r. *L/11/7.



67

67. ***Still Life,*** 1953. Oil on canvas. 38 x 35.99 cm (approx. 15" x 14 ¼").

**Numbering for the year 2010/2011 Cumulative Index of Recovered Art began with Volume 12, no. 1.*

STOLEN ART ALERT

The following paintings by **L.S. LOWRY** *(English, 1887-1976), stolen from a private residence in Cheshire, England on May 3, 2007 (*L07.199), were recovered by police in Merseyside, England in July 2011. See also items 75-77 below:*

68. ***The Viaduct,*** 1954. Oil on canvas, 60.95 x 91.45 cm. Signed l/r.

69. ***Tanker Entering the Tyne,*** 1967. Oil on canvas. 50.8 x 76.2 cm. Signed l/l.

68

69

WORKS ON PAPER

*The following works on paper were stolen in Monaco and recovered by the Carabinieri in Monza, Italy on June 3, 2011. *L11.7. See also items 66-67 above:*

70. BALTHUS (French, 1908-2001). ***Sleeping Girl.*** Pencil on paper. 23.01 x 32.99 cm (approx. 9" x 13"). Signed l/l.

71. VIRGINIO GHIRINGHELLI (Italian, 1898-1964). ***Bozzetto per composizione,*** 1936. Oil on canvas. 18.01 x 24.99 cm (approx. 7" x 9 ¾"). Signed verso.

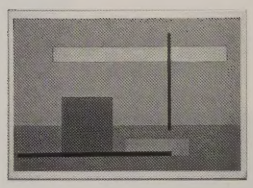
GIORGIO MORANDI (Italian, 1890-1964):

72. ***Still Life,*** 1963. Watercolor on paper. 25.5 x 19 cm (approx. 10" x 7 ½"). Signed l/c. Signed l/c.

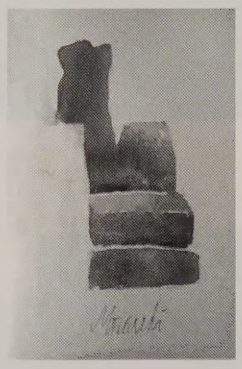
73. ***Still Life with Bottles,*** 1941. Pencil drawing. 21.01 x 30.99 cm (approx. 8 ¼" x 12 ¼").

74. ***Still Life with Bottles.*** Pencil. 16.71 x 24 cm (approx. 6 ½" x 9 ½").

70

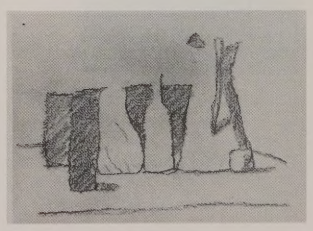


71

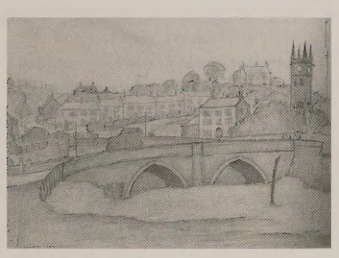


72

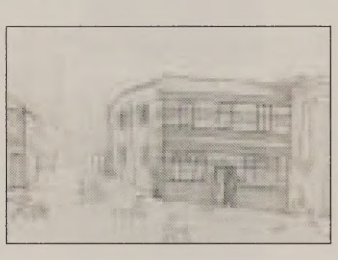
73



74



75



77

78

79

The following works on paper by **L. S. LOWRY** (English, 1887-1976), stolen from a private residence in Cheshire, England on May 3, 2007 (*L07.199), were recovered in Merseyside, England in July 2011. See also items 68-69 above:

75. ***The Bridge at Ringley,***1926. Pencil. 35.55 x 25.4 cm. Signed and dated l/l.

76. ***The Street Market,*** 1924. Pencil. 40.65 x 27.95 cm. (Photo not shown.)

77. ***The Surgery,*** c.1060-69. Pencil. 35.55 x 25.4 cm. Signed and dated l/r.

SCULPTURE

78. UNKNOWN (English, early 17th century). ***Dr. Peter Turner,*** c.1615. Painted alabaster. H: 72 cm (approx. 28 ¼"). *L10.108780. *R1220. Stolen from St. Olave's Church during the London Blitz in April 1941. Recovered with the help of the ALR in London in April 2010.

MISCELLANEOUS

79. ***Action Comics no. 1,*** June 1938. ***The debut of Superman.*** *N00.26. Stolen from the home of the actor Nicholas Cage in Los Angeles, CA sometime between October 31, 1999 and January 21, 2000. (See *IFAR Journal,* Vol. 3, no. 2, item no. 32). Recovered in Simi Valley, CA in March 2011.

STOLEN ART ALERT

RECOVERED ART (CONT.)

DECORATIVE ARTS

CERAMICS, POTTERY, PORCELAIN

The following two pieces of Worcester porcelain that were stolen from Berkeley Castle, Gloucestershire, England on May 5, 1999 were recovered with the help of the ALR in September 2010:

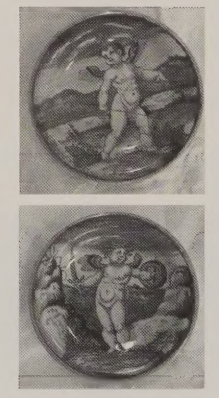
80. *Ice pail.*

81. *Twin-handled vase.*

80 & 81

---

82. The two Majolica "Cupid" plates at right were looted from the Castle Friedenstein, Gotha, Germany in 1945 (*W07.26) and recovered with the help of the ALR in December 2010. The dishes were returned to the Castle on May 20, 2011.



82

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2010 CUMULATIVE INDEX OF STOLEN ART

PUBLISHED IN VOL. 12, NOS. 1-4 (2010/2011)

A

Abrams, E. 156
Ackerman, P. 14
Adams, S. L. 119
Albers, J. 261

B

Banksy 39, 40; 157
Barrett, R. 197
Bartow, R. 191
Barye, A. 140
Basoeki, A. R. 158
Bassano, J. 159
Bear, C. 221
Becker, H. 58, 59
Beckman, S. 120
Bellini, G. 178
Ben Avram, E. 44
Bieruma-Oosting, J. 83
Bill, L-L. 15
Blackman, C. 60
Blais, J-C. 187
Bourgain, G. 36
Bouvier, M. 16
Boy, B. 160
Boyd, D. 61
Braque, G. 9

C

Calderon, C. C. 34
Canning, C. 62
Cascio, L. 17
Casson, A. J. 238
Chabaud, A. E. 18
Chagall, M. 110
Chinese Antiquities 266, 267
Clark, V. 161
Claude, E. 232
Clyatt, B. 141
Coburn, J. 63
Collins, D. 198
Coustou, G. 139
Craig, P. 199
Cropsey, J. F. 162, 163
Cumbrae Stewart, J. 64

D

Dalou, J. 192
Daum 142
Deans, P. 136-138
Decorative Arts 52-57; 149-155; 268, 269
Del Piombo, S. 102
Del Rosario, E. 1
Dickerson, R. 65
Dijk, L. van 84
Drew, J. 66, 67
Dubuc, J. L. 19
Dufy, R. 45
Dunbier, A. W. 208, 209

E

Emdor, M. 68
Enriquez, C. 215-217
Erni, H. 164

F

Fengmian, L. 189
Foujita, T. 21; 46
Foweraker, A. M. 92
Fredriksson, C. 135
Friedensohn, E. 247-250
Fudge, C. 91

G

Garin, E. 79, 80; 121, 122
Gauvreau, P. 255
Geiger, R. 2
Gilchrist, J. 200
Gilliam , T. 262
Giordano, L. 165
Gluckmann, G. 259-261
Goethals, E. R. 38
Gogh, V. van 104
Goldberg, M. 93
Gore, F. J. P. 5
Green, D. 243
Grigg, C. 123
Guardi, F. 166
Guardi (after), F. 211

H

Hals, F. 213
Hart, P. 69
Havell, E. Jr. 218
Heinsheimer, F. 94
Hesse, H 181
Hirst, D. 244
Hochard, G. 233
Hundertwasser, F. 116

I

Ida, B. 201
Ivory 268, 269

J

Jackson, A. Y. 239
Jacobs, F. 167, 168
Japy, L. A. 234
Jawlensky, A. von 184
Jentsch, A.S. 87
Johnston, F. H. 240

K

Kentridge, W. 112
Kesting, E. 117
Kline, F. 245
Kneale, B. 263
Knight, L. A. 35
Koch, F. 88
Koch, M. 95
Koekkoek, H. 78
Kohl, R. 96
Kollwitz, K. 113
Komar and Melamid 202
Kramer P. 169, 170
Kubin, A. 114

L

Labasque, J. 22
Lamb, C. V. 89
Lavault, A. T. F. de 235
Leduc, F. 256
Léger, F. 10; 41; 203
Lehman, S. 133, 134
Lemieux, J. P. 257
Lichtenstein, R. 126-132; 203
Liebermann, M. 97
Lindsay, N. 107-109
Liner, K. A. 98
Luks, G. 212

M

MacDonald, J. E. H. 241
MacGonigal, M. J. 90
Machado-Lecuona, I. 246
Maclet, E. 47
MacNee, D. 171, 172
Mamaladze, M. 99
Marcoussis, L. 23
Mason, P. 143
Matine-Daftary, L. 75, 76
Matisse, H. 11
McGee, B. 185, 186
McLeary, K. 100
Mendelsohn, E. 115
Meshberg, L. 204
Miró, J. 51
Mixed Media 185-188; 243, 244
Modigliani, A. 12
Mol, L. 194
Mondrian, P. Jr. 6
Moore, H. 144
Moore, J. 145
Moser, K. 173

N

Nardo, M. di 179
Nedham, W. 85
Neiman, L. 101

P

Paintings 1-38; 58-106; 156-184; 197-242
Pamboudjian, G. 24-29
Parker, B. 48
Perceval, J. 70
Photographs 133-135
Picasso, P. 13; 49; 111

Portinari, C. 7
Poussin, N. 177
Prints, Lithos 51; 116-132; 196; 259-261

R
Raphael (after) 43
Recco, N. M. 236
Reinagle, P. 219
Rodin, A. 195
Rosa, S. 220
Ross, R. 223-226; 251-254
Rotig, G. F. 33
Rousseau, H. E. 30
Rousseau, T. 182
Ruysdael, J. I. van 214

S
Sahuguet, C. 31
Saito, K. 124, 125
Sanchez, T. Jr. 210
Saubert, T. 222
Schlemmer, O. 188
Schwiering, C. 4
Sculpture 136-148; 191-195; 262-265
Shead, G. 71
Shishkin, I. 174
Signac, P. 50
Smythe, E. R. 175
Snaffles (Charles Johnson Payne) 205
Solar, X. 8
Springer, C. 77
Staudacher, H. 183
Stokes, A. 86
Storrier, T. 72
Streeton, A. 73
Sumner, M. 42
Suzor-Coté, M-A. 242

T
Tanoux, H. A. 37
Tennyson, L. 81
Topp, A. 118
Twachtman, J. H. 103

U
Uchytilova, M. 146
Underwood, L. 264

V
Valette, J. 237
Varley, F. J. 258
Vasarely, V. de 176; 190
Veyrassat, J. J. 32

W
Ward, J. 206
Warhol, A. 105; 196
Wijnants, J. 207
Wilson, D. L. 74
Works on Paper 39-50; 107-115; 189, 190; 245-258

X
Xingjian, G. 106

2010 CUMULATIVE INDEX OF MISSING ART

PUBLISHED IN VOL. 12, NOS. 1–4 (2010/2011)

B
Bastianini, G. 26
Bedard, M. 7
Beuys, J. 20

C
Constable, J. 8

D
Dalí, S. 27

F
Foos. J. 21

H
Husain, M. F. 9

I
Icons 16

J
Jin, L. 24

K
Kabakov, I. 17-19

L
Lyddon, K. 22

M
McLaughlin, J. D. 25
Moore, H. 23

N
Nunn, A. 10

O
Olbinski, R. 11

P
Paintings 1, 2-15
Philippe, P. 28
Pillman, S. 12
Priddle, T. 4-6
Prints 25

S
Sculpture 13, 26-29
Seago, E. 2
Sharp, D. 3
Steele, T. C. 13

W
Wertmuller, A. U. 15
Works on Paper 17-24

2010 STOLEN / MISSING FROM THE EGYPTIAN MUSEUM

Egyptian Antiquities
2, 3; 6, 7; 12; 19-20; 25-30; 32-45; 47; 51; 53, 54

2010 RECOVERED BY THE EGYPTIAN MUSEUM

Egyptian Antiquities
1; 4,5; 8-11; 13-18; 21-24; 31; 46; 48-50; 52

2010 CUMULATIVE INDEX OF RECOVERED ART

PUBLISHED IN VOL. 12, NOS. 1–4 (2010/2011)

A
Antiquities 36

B
Bennett-Oates, G. 16
Brueghel (the Elder), J. 5, 6

C
Caravaggio (after) 1
Ceramics, Pottery, Porcelain 80-82
Corot, J-B. C. 27

D
Decorative Arts 14, 80-82
Degas, E. 15
Drtikol, F. 35

E
El Greco 65
Ernst, M. 12

F
Furniture 23

G
Gierymski, A. 29
Goya, F. de 64
Guardi, F. 28

K
Klein, A. 30
Klinkenbeg, J. 17

L
Lacroix, C-F. 18
Léger, F. 63
LeRoy & Fils 26
Leys, B. H. 2
Lowry, L. S. 68, 69
Luny, T. 9

M
Miscellaneous 24, 25; 79
Monet, C. 7
Morandi, G. 66, 67
Morrice, J. W. 31

O
Orsi, L. 32

P
Paintings 1-12; 15-22; 27-33; 63-69
Photographs 35
Picasso, P. 34
Pissarro, C. 4
Preiss, F. 13

S
Sculpture 13, 78
Sisley, A. 8
Smith, C. A. 19
Sorolla y Bastida, J. 33
Stone, M. 20, 21

T
Thomas, C-E. 14
Traies, W. 10, 11
Turner, D. 3

W
Watches, Clocks Timepieces 26
Works on Paper 34; 70-77

Z
Zoffany, J. 22

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STOLEN ART

PAINTINGS

203

211

213 RECOVERED

219

245

203 ROY LICHTENSTEIN (American, 1923-1997). ***Sunrise,*** 1965. Enamel on steel. 22 ½" x 36" (57.15 x 91.44 cm). *L11.206. Stolen from a gallery in New York on April 8, 2011.

211 FRANCESCO GUARDI, after (Italian, 1712-1793). ***Study of Boats.*** Oil on panel. 4 ½" x 3" (11.43 x 7.62 cm). *L11.399. Stolen from a private business in New York on June 14, 2011. See also item 212, this issue.

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213 FRANS HALS (Dutch, 1581-1666). ***Laughing Boy with a Pitcher of Beer.*** Oil on canvas. 69.49 x 57.99 cm (approx. 27 ¼" x 22 ¾"). Monogram "FH" l/r. *L11.325. Stolen from a museum in Leerdam, The Netherlands on May 27, 2011. Recovered on October 28, 2011. See also item 215 inside.

219 PHILIP REINAGLE (English, 1749-1833). ***Harrier Killing a Bittern,*** 1797. Oil on canvas. 201 x 145 cm (approx. 6'6" x 4'9"). *L11.400. Stolen from the British Ambassador's residence in Tripoli, Libya during civil unrest on May 1, 2011. See also items 218 and 220, this issue.

WORKS ON PAPER

245 FRANZ KLINE (American, 1910-1962). ***Study for "Turbin,"*** 1958. Brush and ink on paper. 11" x 8 ½" (27.94 x 21.59 cm). Signed and dated in graphite. *L11.298. Stolen from a gallery in New York on May 15, 2011.

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